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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 228

TENNESSEE GAS TRANSMISSION COMPANY,
Appellant,

v.

MISSISSIPPI STATE TAX COMMISSION,
Appellee.

Appeal from the Supreme Court of the State of Mississippi

JURISDICTIONAL STATEMENT

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Appeal from the Supreme Court of the State of Mississippi

STATEMENT AS TO JURISDICTION

Appellant appeals from the judgment of the Supreme Court of the State of Mississippi entered on December 14, 1959, reversing a final decree of the Chancery Court of the First Judicial District of Hinds County, Mississippi, entered on January 27, 1959, and submits this statement to show that the Supreme Court of the United States has jurisdiction of the appeal and that a substantial question is presented.

OPINION BELOW

The opinion of the Supreme Court of the State of Mississippi is reported in .... Miss. .... and 116 So. 2d 550. Opinions of the Chancery Court of Hinds County, Mississippi are not reported. A copy of the opinion of the Supreme Court of the State of Mississippi, together with the dissent thereto, is attached hereto as Appendix A and a copy of the opinion of the Chancery Court of Hinds County is attached hereto as Appendix B.

JURISDICTION

This proceeding was initiated by timely petitions of appellant to the Mississippi State Tax Commission under section 9328 of the Mississippi Code of 1942, Recompiled, as amended, 1956, for the correction of assessments of franchise tax for each of the franchise tax years 1956 and 1957, as imposed in accordance with the provisions of section 9319, Mississippi Code of 1942, Recompiled, as amended, 1956, and for a refund of any excess taxes paid. The Mississippi State Tax Commission, by order dated October 3, 1957, affirmed the assessments and rejected and overruled the petitions. The Chancery Court, First Judicial District, Hinds County, Mississippi, by final decree, dated January 27, 1959, reversed and set aside the Mississippi State Tax Commission's order and entered judgment for appellant. The Supreme Court of the State of Mississippi reversed the decree of the Chancery Court of Hinds County, Mississippi, and reinstated and affirmed the order of the Mississippi State Tax Commission of October 3, 1957, but modified that order so as to award appellant a refund of $710. Judgment was entered in the Supreme Court of the State of Mississippi on De-

cember 14, 1959 (R. 118). A copy of this judgment is attached hereto as Appendix C. On February 1, 1960, the Supreme Court of the State of Mississippi overruled a Suggestion of Error that had been timely filed by appellant in that court subsequent to its judgment (R. 119). A copy of this order is attached hereto as Appendix D. Notice of appeal to this Court was filed in the Supreme Court of the State of Mississippi by appellant on March 11, 1960 (R. 121). By order dated April 27, 1960, a Justice of the Supreme Court of the State of Mississippi enlarged the time for docketing the case in this Court to and including July 9, 1960. A certified copy of that order is submitted with and made a part of the record herein.

The Jurisdiction of the Supreme Court of the United States to review the decision in this case on appeal is conferred by Title 28, U.S. Code, Section 1257(2), as the decision was rendered by the highest court of the State of Mississippi and held that the Mississippi statute in question was not repugnant to the Constitution of the United States.

The following decisions sustain the jurisdiction of the Supreme Court to review by appeal the judgment in this case: *Railway Express Agency, Inc.* v. *Virginia*, 358 U.S. 434 (1959); *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947); *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942); and *Hans Rees' Sons, Inc.* v. *North Carolina, ex rel. Maxwell*, 283 U.S. 123 (1931).

QUESTIONS PRESENTED

The Federal questions presented below and on this appeal are:

1. Whether the franchise tax imposed upon appellant by the State of Mississippi, as computed in ac-

cordance with the provisions of section 9319 of the Mississippi Code of 1942, Recompiled, as amended by Chapter 412, section 4, of the Laws of Mississippi of 1956, is invalid as being repugnant to the Commerce Clause, Article I, section 8, of the Constitution of the United States and also constituted a violation of appellant's rights under the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States, in that appellant was required under said section to compute the value of capital employed in the State of Mississippi, which is the measure of the tax, under a formula which required the inclusion as a part of the amount of gross receipts from business carried on in Mississippi of amounts which were artificially computed and which constituted gross receipts from business done wholly outside the state, thus making extraterritorial commerce or interstate commerce a predominant factor in such computation and resulting in an allocation of such capital subject to the aforesaid franchise tax that was arbitrary, unreasonable and discriminatory.

2. Whether the Mississippi franchise tax imposed upon appellant as computed under section 9319 of the Mississippi Code of 1942, Recompiled, as amended by Chapter 412, section 4, of the Laws of Mississippi of 1956, is invalid and repugnant to the Commerce Clause, Article I, section 8, of the Constitution of the United States and to the Due Process Clause of the Fourteenth Amendment to the Constitution of the United States in that said statute required extraterritorial capital to be subject to the Mississippi franchise tax and thereby placed an undue burden on the interstate commerce business of appellant and subjected appellant to the deprivation of property without due process of law.

STATUTE INVOLVED

The statute of the State of Mississippi, the validity of which is here brought into question, is section 9319, Title 37, Chapter 2, of the Mississippi Code of 1942, Recompiled, as amended by Chapter 412, section 4, of the Laws of Mississippi of 1956, which reads as follows:

"§ 9319. *Multistate corporations.*

"In the case of organizations doing business both within and without Mississippi, the value of the capital employed in this state shall be determined by first computing the ratio between (1) the real and tangible personal property owned or used in Mississippi and gross receipts from business carried on in Mississippi and (2) the total real and tangible peronal property and gross receipts wherever located and from wherever received. Said ratio then shall be applied to the total capital stock, surplus, undivided profit and true reserves and the result of that application shall be the capital employed in this state. Provided, however, that the amount of the determined capital in Mississippi shall in no case be less than the assessed value of the property of the organization for the year preceding the year in which the return is due.

"For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts."

The whole of Chapter 2, Title 37, Mississippi Code of 1942, Recompiled, as amended by the Laws of Mississippi of 1956, is printed as Appendix E hereto.

STATEMENT OF THE CASE

The material facts in this case appear in the stipulation of the parties and the exhibits attached thereto (R. 41-48). Appellant is a Delaware corporation with its principal offices in Houston, Texas. It is, and during the franchise tax years 1956 and 1957 was, qualified to do business in the State of Mississippi. Appellant owns and operates approximately 925 miles of natural gas transmission pipelines in Mississippi through which it transmits natural gas gathered in the states of Texas and Louisiana to areas in northern states. In connection with its pipeline, appellant maintains in Mississippi four compressor stations, eighteen meter stations, and has there a number of operating and maintenance employees. Appellant, for the franchise tax years 1956 and 1957, also owned and operated approximately forty-five automobiles, trucks and trailers, and owned dwelling houses on its compressor station properties used by its operating and maintenance employees.

During the franchise tax years 1956 and 1957, appellant made no direct sales or deliveries of gas in the State of Mississippi but, during said years, did deliver some wholesale quantities of gas therein. Appellant had a partial interest in thirteen oil wells in Mississippi, none of which it operated. The oil holdings of appellant within the State of Mississippi are, and were during these years, such that they can be clearly shown to be distinct and separable from the operation of its natural gas pipeline transmission system and could be discontinued entirely without causing a withdrawal from its interstate gas transmission business. The ex-

tremely small amount of business carried on in Mississippi by appellant is shown by a comparison of receipts from its various activities in or related to Mississippi with those from its over-all pipeline operations. The gross revenue from appellant's oil holdings in Mississippi for the period effective for the franchise tax year 1956 was $66,253 and revenue from its dwelling houses on compressor station properties was $6,136. For this same period receipts from interstate wholesale gas deliveries in Mississippi amounted to $1,324,944. Contrasted with this, total receipts on wholesale gas deliveries in interstate commerce for the period amounted to $160,565,026.

Title 37, Chapter 2, Mississippi Code of 1942, Recompiled, as amended, imposes a franchise tax on both foreign and domestic corporations doing business within the State of Mississippi (Appendix E, *infra*). Section 9314 imposes a tax on foreign corporations equal to $2 of each $1,000, or fraction thereof, of the value of capital used, invested or employed within the state. Section 9319 of the Code, *supra*, as amended in 1956, prescribes a formula to be used in determining the amount of capital employed in the state in the case of organizations doing business both within and without Mississippi. It provides that the total capital stock, surplus, undivided profits and true reserves of the taxpayer are to be multiplied by a percentage ratio or fraction. The numerator of this ratio is the real and tangible personal property owned or used in Mississippi, plus the gross receipts from business carried on in Mississippi. The denominator is the total real and tangible personal property wherever located, plus the gross receipts wherever located and from wherever received. The result of the application of the ratio or

fraction thus obtained is the capital employed in the state, or the base upon which the franchise tax is levied, as indicated above.

Prior to the enactment of Chapter 412, section 4, of the Laws of Mississippi of 1956, the apportionment formula for determination of capital employed in the state was in substance that set forth above. However, the statute as it then existed did not direct the method of determining gross receipts from business carried on in Mississippi, and appellant computed that figure as required by the State Tax Commission by adding: (a) its receipts from wholesale gas deliveries in the state, (b) receipts from all oil properties in the state, and (c) rentals from houses on its compressor station properties in the state (R. 96).

Section 9319, as amended in 1956, *supra*, now requires an organization which uses a formula method of apportionment for income tax purposes to determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved by such income tax formula and adding to the result of such application any non-unitary Mississippi receipts.

Appellant uses a formula method of apportionment in making its income tax returns to the State of Mississippi (R. 50). Being a foreign corporation and a pipeline (other than a carrier), appellant was required for the years under consideration to make income tax returns under the apportionment formula provided by Mississippi State Tax Commission Regulations No. 10, Article 250, and No. 11, Article 247. Article 250 of Regulations No. 10 requires the use of a ratio which consists of the average of the sum of the ratios of the following factors: (1) the ratio of gross revenues aris-

ing within the state from unitary operations as related to the total corresponding gross revenues of the system; (2) the ratio of the average accumulated investment in real and tangible personal property used or employed in connection with the unitary operations within Mississippi as related to the total for the system; and (3) the ratio of salaries and wages paid or incurred in the unitary operations within Mississippi as related to the corresponding total for the system. The ratio required by Article 247 of Regulations No. 11 is that obtained by taking the arithmetical average of the following three ratios: (1) pipeline property owned or used in Mississippi to total pipeline property; (2) Mississippi operating labor to total operating labor; and (3) deliveries in Mississippi to total deliveries. The regulations also provide the types of property and adjustments which are to be taken into consideration in arriving at property values, specify the wages and other compensation that are to be taken into consideration and those which are to be excluded in arriving at the labor factor, and also provide that the ratio with respect to deliveries shall be determined by dividing revenue derived from deliveries in Mississippi by revenue derived from total deliveries. A copy of each of the Mississippi State Tax Commission Regulations No. 10, Article 250, and No. 11, Article 247, is attached hereto as Appendix F.

Appellant brought this action by petition and appeal in the Chancery Court of the First Judicial Circuit of Hinds County, Mississippi, against the Mississippi State Tax Commission seeking reversal of an order of that Commission dated October 3, 1957 (R. 26-27), denying appellant's request for a redetermination of liability and refunds of overpayments of franchise tax

in the amounts of $5,412 and $7,143 for the franchise tax years 1956 and 1957, respectively. In its First Amended Original Petition, dated May 16, 1957, to the Commission, appellant contended that the final paragraph of section 9319, Mississippi Code of 1942, Recompiled, as amended in 1956, *supra*, was invalid, as being repugnant to the Constitution of the United States, and thus gave rise to an overassessment of tax by that body (R. 12-17).

In its petition in the Chancery Court, appellant urged upon that court the invalidity of the statute in question because of its violation of the Commerce Clause of the Constitution of the United States and of the Equal Protection and Due Process Clauses of the Fourteenth Amendment to the Constitution of the United States. It also incorporated in that petition its previous petitions to the Mississippi State Tax Commission for each of the franchise tax years 1956 and 1957 (R. 3, 4, 8).

The Chancery Court sustained appellant's contentions and overruled the Mississippi State Tax Commission's order, concluding that (R. 75-76):

> "For the reasons herein enumerated, the mandatory requirement, contained in Section 4, Chapter 412, Laws of the State of Mississippi enacted in 1956, that 'For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts' is unconstitutional because it violates the Commerce Clause (Article I, Section VIII) of the Constitution of the United States."

On January 27, 1959, the Mississippi State Tax Commission filed a notice of appeal in the Chancery Court (R. 79) and, subsequently, submitted an assignment of errors to the Supreme Court of Mississippi (R. 83), alleging that the final decree in the lower court was contrary to law and contending in paragraphs 3 and 4 that:

> "3. The lower court erred in holding that the franchise tax formula, as provided for by section 9319, *Mississippi Code of 1942*, as amended by the Mississippi Legislature in 1956, places an undue burden on interstate commerce and caused a duplication of taxes on the same gross receipts from interstate (*sic*) in other states through which appellee's interstate gas transmission lines run.
>
> "4. The lower court erred in holding it mandatory that the requirement contained in section 4, Chapter 412, *Laws of the State of Mississippi enacted in 1956*, provided that: 'For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts' is unconstitutional because it violates the Commerce Clause (Article I, Section VIII) of the *Constitution of the United States.*" (*sic*)

The Supreme Court of Mississippi, on December 14, 1959, entered its order reversing the decree of the Chancery Court with modifications (R. 118) and filed its opinion, in which it ruled that section 9319, Mississippi Code of 1942, Recompiled, as amended, in its application to appellant for the franchise tax years 1956 and 1957, did not contravene the Commerce Clause or the

Due Process Clause of the Constitution (R. 85, 112), and that the formula prescribed by the statute resulted in a reasonable approximation of the capital used, invested or employed in Mississippi and in a measurement of the franchise tax reasonably related to the privilege granted.

It is not the appellant's contention here, nor has it been during the course of the proceedings below, that it, as a pipeline engaged principally in interstate commerce, is not subject to the franchise tax imposed on foreign corporations under section 9314 of the Mississippi Code of 1942, Recompiled, as amended. It concedes that this question was settled by the decision of this Court in *Memphis Natural Gas Co.* v. *Stone*, 335 U.S. 80 (1948). It also concedes that the amount of capital employed in the state may be determined by use of the factors of real and tangible personal property owned or used in Mississippi, gross receipts from business carried on in Mississippi, total real and tangible personal property wherever located, and gross receipts from wherever received. It does, however, dispute the validity of the method of determination of the factor of "gross receipts from business carried on in Mississippi" which is required by legislation adopted by the Mississippi State Legislature in 1956 for those organizations using a formula method of apportionment in making income tax returns. Corporations such as appellant are required under the Mississippi statute and regulations to use an apportionment formula in making income tax returns. This forces them to employ in the apportionment formula prescribed by the statute for the franchise tax a factor which does not truly represent business done in Mississippi but which incorporates extraterritorial values.

The incorporation of extraterritorial values in the factor of gross receipts from business carried on in Mississippi results in the transmutation of such extraterritorial values into a corresponding increase in the amount of capital considered employed in the state of Mississippi for purposes of the franchise tax. This, then, works a distortion of any attempt at fair allocation of capital employed within the state of Mississippi and consequently allows the Mississippi franchise tax to be levied upon a portion of appellant's capital which has no logical, rational, or discernible connection with the state of Mississippi and the purposes for which the tax is allowed to be levied.

The contentions of appellant with respect to the taxation of extraterritorial values may be illustrated by reference to the franchise tax year 1956 and specific figures, as applicable under the franchise tax apportionment formula in effect prior to the 1956 amendment and that in effect after the enactment of the legislative definition of "gross receipts from business carried on in Mississippi." In this connection, it should be noted that values used with respect to any franchise taxable year are those existing in general at the close of the previous calendar year. (Section 9315(b), Mississippi Code of 1942, Recompiled, as amended; Appendix E, *infra*). Thus, gross receipts used in the 1956 franchise tax return are actually gross receipts of the corporation for the calendar year 1955. The record shows that actual gross receipts of appellant in Mississippi for the year 1955 were $1,397,333. This figure is composed of receipts from wholesale gas deliveries in Mississippi in the amount of $1,324,944 (R. 61) plus receipts from oil properties in the amount of $66,253 (R. 43) plus rental revenue from its dwelling

houses on compressor station properties used by its employees in the sum of $6,136 (R. 43). By employment of the formula prescribed by the legislature in the 1956 amendment for the determination of gross receipts from business carried on in Mississippi, a figure of $11,204,833 is derived (R. 59, 62). Thus, the amount of receipts attributable to Mississippi business is increased $9,807,500 over actual Mississippi receipts. This increase, amounting to 801%, is obviously brought about by the employment of an arbitrary and unreasonable computation having no real relationship to appellant's business in Mississippi.

The Chancery Court, in its opinion, found that capital allocated to the State of Mississippi by employment of the formula required by the 1956 amendment amounted to $22,159,288 (R. 72), whereas, capital to be allocated to the State of Mississippi by using the factor of actual business receipts in Mississippi amounted to $19,815,750 (R. 71). Thus, capital is allocated to the State of Mississippi, and made subject to its franchise tax, in the amount of $2,343,538, that would not have been so allocated had it not been for the requirement of the 1956 amendment that the income tax apportionment formula be employed in determining gross receipts from business carried on in Mississippi. This results in the incorporation of extraterritorial income in the receipts from Mississippi business factor in the franchise tax formula, as pointed out above. It follows, necessarily, that a corresponding incorporation of extraterritorial value in the amount of capital determined to be employed in the state is brought about by exercise of the statutory formula thus distorted.

Appellant thus contends that by the incorporation of extraterritorial values in, and as a determining factor

of, capital employed in Mississippi, the state has placed upon appellant's interstate commerce an undue burden in contravention of the Commerce Clause, Article I, section 8, of the Constitution of the United States, and has deprived it of property without due process of law and of the equal protection of the laws, all in contravention of the Fourteenth Amendment to the Constitution of the United States.

THE QUESTIONS ARE SUBSTANTIAL

In a number of cases which generally have upheld the validity of state taxing statutes, this Court, in the past two or three years especially, has recognized the great importance of the area of state taxation as it impinges on, or affects in any manner, interstate commerce. These cases, of course, are so familiar to the Court as to require no citation. This case is one of novel application and is, thus, generally outside the orbit of those cases previously decided. It is, however, of similar and of equal importance both to the states and to individual taxpayers. The questions presented herein take on added significance because state taxes are one of the factors used in setting rates charged by regulated companies such as appellant. Thus, gas consumers in a large portion of the United States are directly affected by the final decision.

The constitutional questions presented in this appeal are novel in that this Court has never been called upon to decide the validity of a state franchise tax employing an apportionment formula of the precise nature here involved. Moreover, the case is of far reaching importance because the challenged statute, in employing the income tax sub-formula, referred to above and discussed further hereinafter, presents a

new and extreme method of measuring capital allocable to a state for franchise tax purposes.

This Court has held, in a number of cases where a corporation's business is of a unitary nature, being both within and without a state, that the state may impose upon the corporation a franchise tax which, in its measure, takes into consideration receipts from, and property employed in, its interstate operation. See for example, *International Harvester Co.* v. *Evatt*, 329 U.S. 416 (1947) and *Ford Motor Co.* v. *Beauchamp*, 308 U.S. 331 (1939). However, in both of these cases, each factor attributed to the state, as used in the franchise tax apportionment formula, had a definite, tangible connection with the state and was not one which, itself, was arrived at purely upon the basis of another allocation formula. It was in each instance a known quantity, pure in its derivation, and not one artificially contrived with respect to actual state affiliation. In the *Ford Motor Co.* case, capital was allocated to the state of Texas for franchise tax purposes by the employment of a formula which used the ratio of sales in Texas to total sales of the Company.

The *International Harvester* case involved the franchise tax of the state of Ohio, and allocation of capital to the state of Ohio was made by an apportionment formula which used all of the factors employed in the Mississippi state franchise tax apportionment formula here under consideration. A part of the formula was a fraction whose numerator was the total value of the business done in the state of Ohio, just as a portion of the Mississippi formula is gross receipts from business carried on in Mississippi. In the "business done" numerator of the Ohio formula, the state included as a part of Ohio business an amount equal to the sales proceeds of a part of the goods manufactured in the

taxpayer's Ohio plants that were delivered outside of the state of Ohio. Nevertheless, it should be noted that the total of business done in Ohio had a definite tangible connection with that state, that is to say, that amounts included therein represented actual sales and receipts in Ohio or represented the sale of goods which had been manufactured in Ohio. There was no attempt to compute business done in the state of Ohio by the employment of a formula which would take into consideration all of the taxpayer's receipts no matter where the goods were manufactured or sold and attempt to arrive at an approximation of what should be considered as "business done in Ohio." There was a definite nexus of the factor to the state.

In contrast to this, the Mississippi franchise tax apportionment formula, as prescribed by section 9319 of the Mississippi Code, *supra*, as amended in 1956, requires taxpayers using a formula method of apportionment in making income tax returns to abandon completely any attempt to relate gross receipts specifically to Mississippi in computing their franchise tax. They are required by the statute to depend entirely upon the arbitrary application of the income tax formula to total unitary receipts in determining the amount required to be treated as gross receipts from business carried on in Mississippi for use as a factor in the franchise tax apportionment formula.

As pointed out above, the income tax apportionment formula applicable to appellant requires the use of a ratio which is arrived at by taking the arithmetical average of the following three ratios: (a) pipeline property owned or used in Mississippi to total pipeline property; (b) Mississippi operating labor to total operating labor; and, (c) deliveries in Mississippi to total

deliveries.* The result of this is the ratio which is required to be applied to total unitary receipts for the purpose of obtaining the factor of gross receipts from business carried on in Mississippi to be used in the franchise tax apportionment formula. It can readily be seen that the requirement of the use of this additional sub-formula results in a duplication and, thereby, a multiplication of the value given to both total property owned by the taxpayer and total deliveries or receipts of the taxpayer no matter where located or received, in determining the amount of the taxpayer's capital allocable to the state of Mississippi. This duplication and multiplication of total property values and total receipts thereby results in the attribution to Mississippi of extraterritorial receipts and, consequently, the allocation of extraterritorial capital for purposes of the state franchise tax.

This employment of a formula which allows extraterritorial values having no real connection with the state to be taken into consideration in allocating capital to the state for franchise tax purposes opens a wide avenue to states to increase their revenues under franchise tax acts which might otherwise be valid. It results in the imposition of a burden on interstate commerce by allowing a portion of that commerce to be subjected to the taxing power of a state, such as Mississippi, unfairly under the guise of a franchise tax on capital and further deprives taxpayers, such as appellant, of property without due process of law and of the equal protection of the laws by taxing values extraterritorial to the state.

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*The actual provisions are contained in the Mississippi State Tax Commission Regulations No. 10, Article 250, effective with respect to the franchise tax year 1956, and in Regulations No. 11, Article 247, with respect to the franchise tax year 1957. See Appendix F, *infra*.

This is an area in which clarification should be given by this Court in the interest of guidance, not only to taxpayers, such as appellant, conducting interstate businesses, but also to taxing authorities in the administration of such laws in the several states.

CONCLUSION

The jurisdiction of the Supreme Court to review this case on appeal is clear and unquestionable. Because of the importance of the issues involved and the apparent error in the judgment of the state court, appellant urges that the Supreme Court give plenary consideration to the case and permit briefs and oral argument on the merits.

Respectfully submitted,

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APPENDIX A

IN THE SUPREME COURT OF MISSISSIPPI

No. 41,264

MISSISSIPPI STATE TAX COMMISSION

v.

TENNESSEE GAS TRANSMISSION COMPANY

ETHRIDGE, JUSTICE:

This case involves the validity of an apportionment formula of a state franchise tax upon a multistate corporation, measured by an allocation to Mississippi of capital used, invested or employed within the state. The chancery court held the statutory formula was void because in violation of the interstate commerce and due process clauses of the United States Constitution. However, we conclude that the statute is a valid exercise of the State's taxing power.

I.

The corporate franchise tax was originally enacted in 1934. Miss. Law 1934, Chapter 121; Miss. Laws 1940, Chapter 115. Its amount was increased in 1955. Miss. Laws 1955, Ex. Sess., Chapter 118. In 1956 the Legislature substantially rewrote the franchise tax act. Miss. Laws 1956, Chapter 412. The provision under attack here was enacted in that year as Section 4, and is Miss. Code 1942, Recompiled, Section 9319:

"Multistate corporations.

"In the case of organizations doing business both within and without Mississippi, the value of the capital employed in this state shall be determined by first computing the ratio between (1) the real and tangible personal property owned or used in Mississippi and gross receipts from business carried on in Mississippi and (2) the total real and tangible personal property and gross receipts wher-

ever located and from wherever received. Said ratio then shall be applied to the total capital stock, surplus, undivided profits and true reserves and the result of that application shall be the capital employed in this state. Provided, however, that the amount of the determined capital in Mississippi shall in no case be less than the assessed value of the property of the organization for the year preceding the year in which the return is due.

"For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts."

The tax is levied on both domestic corporations, Code Section 9313, and foreign corporations, Code Section 9314. It is measured by "the value of the capital used, invested or employed within this state." Section 9314. The local incident, taxable basis or subject of the tax is "the benefit and protection of the government and laws of the state" received by the taxpayer, and as an exaction and recompense for protection of the local activities in maintaining, keeping in repair, and otherwise in manning the facilities of an interstate pipeline. Accordingly, the incident selected does not lend itself to repeated exactions in other states. And it is not discriminatory, when properly apportioned to the capital used, invested or employed in Mississippi. Stone v. Interstate Natural Gas Co., 103 Fed. 2d 544 (C.C.A. 5th 1939), affirmed per curiam in 308 U. S. 522, 60 S. Ct. 292, 84 L. Ed. 442 (1939), following Southern Natural Gas Corp. v. Alabama, 301 U.S. 148, 57 S. Ct. 695, 81 L. Ed. 970, (1936); Stone v. Memphis Natural Gas Co., 201 Miss. 670, 29 So. 2d 268 (1947), affirmed in Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1947); Southern Package Corporation v. State Tax Commission, 195 Miss. 864, 15 So. 2d 436 (1944); see also State

Tax Commission v. Memphis Natural Gas Co., 197 Miss. 533, 19 So. 2d 477 (1944), appeal dismissed in 323 U. S. 682, 65 S. Ct. 440, 89 L. Ed. 553, (apportioned net income tax on interstate gas pipeline company).

Since appellee, Tennessee Gas Transmission Company, contends that Section 9819 is unconstitutional, certain established principles of judicial review should be noted. In determining the constitutionality of a statute, the courts should proceed with the greatest possible caution, and should never declare it void unless invalidity is established beyond a reasonable doubt. They should adopt a construction which will bring the act into harmony with the Constitution, whenever necessary in order to uphold its constitutionality and to carry its provisions into effect. Every intendment is in favor of constitutionality, unless its repugnancy to that document clearly appears. The presumption is in favor of its validity. The propriety, wisdom and expediency of the act is a question for the Legislature and not the courts. It will be presumed that the Legislature considered the effect of the statute, and that it acted with an intent to comply with constitutional provisions and a desire to be fair and equitable. Russell Investment Corp. v. Russell, 182 Miss. 385, 419, 178 So. 315, 182 So. 102 (1938).

These same principles are uniformly applied to judicial review of a legislative apportionment formula for the assessment of a tax. Recently in Stapling Machines Company v. Monaghan, 232 Miss. 484, 99 So. 2d 649, 101 So. 2d 359 (1958), this Court reiterated them. The company, engaged in interstate and intrastate commerce, sued to recover income tax. The Commission used an apportionment formula which was affirmed by this Court, stating: "In the case of Butler Bros. v. McColgan, the Supreme Court of the United States in 315 U. S. 501-510, 82 S. Ct. 701-705, 86 L. Ed. 991-997, held that one who attacks a formula of apportionment carries a distinct burden of showing by clear and cogent evidence that it results in

extraterritorial values being taxed, and in the same case the Supreme Court of the United States discussed at length the question of the correct apportionment formula and held that if the statute as calling for a method of allocation which is fairly calculated to assign to California that part of the net income reasonably attributable to the business done there, any constitutional question arising from the Fourteenth Amendment is at an end."

This Court again followed the authoritative statement of Butler Brothers v. McColgan, in McWilliams Dredging Company v. McKeignay, 227 Miss. 730, 86 So. 2d 672, 677, 678 (1956).

51 Am. Jur., Taxation, Sections 862-863, comments as follows about apportionment of state franchise taxes: ". . . it appears to be well established that such a tax is not invalid where it is imposed upon or measured by only the business of the taxpayer transacted within the state, by means of some reasonable formula for apportioning the exaction to such business." See also 84 C. J. S., Taxation, Section 453.

In short, the issue is whether appellee sufficiently met its "distinct burden of showing by clear and cogent evidence that it (the Mississippi franchise tax measured by the apportionment formula of Section 9319) results in extraterritorial values being taxed." We do not think appellee met that burden of proof. On the contrary, the statute calls for a method of allocation of capital employed in Mississippi which is fairly calculated to assign to Mississippi its just proportion.

II.

Tennessee Gas Transmission Company is incorporated under the laws of the State of Delaware. Its principal office and place of business is Houston, Texas. It and its predecessor have been qualified to do business in Mississippi since July 1947. Appellee's books and records are kept in its home office in Houston, and all contracts entered

into by appellee are executed in Houston. Appellee owns and operates through the State of Mississippi natural gas transmission pipelines, through which it transmits natural gas gathered in the States of Texas and Louisiana through the States of Arkansas, Mississippi and Tennessee and on into destinations in northern states.

Appellee maintains in Mississippi natural gas transmission pipelines. In connection with them it has compressor and meter stations. It maintains employees in Mississippi. During the two franchise tax years in question in this case 1956 and 1957, appellee owned and operated approximately 925 miles of pipelines within the State of Mississippi. It also has in this State four compressor stations and eighteen meter stations. During this period it owned and operated in Mississippi approximately 45 automobiles, trucks and trailers. Appellee also owned dwelling houses on its four compressor station properties used by its operating and maintenance employees.

During the franchise tax years of 1956 and 1957, appellee made no direct retail sales or deliveries of gas in Mississippi, but delivered wholesale quantities of gas in the state. The company has a partial interest in thirteen oil wells in the State, none of which it operates. The gas pipeline transmission system is conducted separately from its oil holdings in Mississippi. The gross revenue from appellee's oil holdings in the state for the two years in question was $66,253.00 and $69,318.00, respectively. Appellee received rental revenue from its dwelling houses on compressor station properties used by its employees in the sum of $6,136 and $7,981 for the tax years for 1956 and 1957. Appellee's pipeline operations are regulated by the Federal Power Commission. Power used to operate the company's gas transmission compressor stations in Mississippi is generated from gas taken from its gas transmission lines in its four pumping stations within the State. Appellee has invoked the statutory grant of eminent domain provided by the laws of Mississippi in the state courts in sev-

eral eminent domain suits. The company paid to the state and political subdivisions ad valorem taxes. The assessed value of its property in the state for 1956 was $19,115,150 and for 1957, $21,250,000. All of the aforesaid property of the taxpayer received the protection of the laws of the State of Mississippi.

Appellee paid its franchise tax for the years 1956 and 1957, as required by Code Section 9319. It then petitioned for refunds because of an alleged excessive allocation to the State of capital employed herein, as a result of the second paragraph of the statute. The State Tax Commission entered an order affirming the assessments and denied the taxpayer's petition. The company appealed to the Chancery Court, First Judicial District of Hinds County, which reversed the Commission, and directed refunds of the alleged excess amounts of tax resulting from the apportionment formula as developed in the second paragraph of Section 9319. This appeal is from that decree.

III.

The tax is computed under the Mississippi statute in the following manner: Code Section 9319 prescribes the formula used in determining what part of a taxpayer's total capital is used, invested or employed within this State. To ascertain this, the total capital stock, surplus, undivided profits and true reserves of the taxpayer is multiplied by a percentage ratio or fraction. The numerator of this ratio is the real and tangible personal property owned or used in Mississippi, plus the gross receipts from business carried on in Mississippi. The denominator is the total real and targible personal property wherever located, plus the gross receipts wherever located and from wherever received. In other words, this is a two-factor formula. The resulting ratio percentage or fraction is then multiplied by the total capital stock, surplus, undivided profits and true reserve. The result of that application is the capital employed in this State. When that tax base is multiplied

by the tax rate of $2 per thousand dollars of capital used, invested or employed in Mississippi, it produces the amount of the franchise tax.

Application of this formula to the 1956 franchise tax of appellee is illustrated as follows:

$$\frac{\$81,531,070 \text{ (property owned or used in Miss.)} \quad \textit{plus} \quad \$11,204,833 \text{ (Miss. gross receipts)}}{\$904,030,377 \text{ (property wherever located)} \quad \textit{plus} \quad \$199,809,756 \text{ (gross receipts wherever located and received)}} = 8.4012\%$$

$$8.4012\% \times \$263,763,362 \text{ (total capital stock, surplus, undivided profits and true reserves)} = \$22,159,288 \times \$2.00 \text{ (tax rate)} = \$44,320 \text{ (which is 1956 tax)}$$

None of these elements of the formula are in dispute *except* the second part of the numerator, "gross receipts from business carried on in Mississippi," which, under the statutory formula, is $11,204,833 for 1956. The taxpayer contends that the formula method of Section 9319 for computing gross receipts from Mississippi business allocates to the State extraterritorial values. Whether it does is the issue in this case.

Prior to the effective date of the 1956 amendment to Section 9319, the apportionment formula was in substance that set forth in the first paragraph of the amended law. However, the former statute did not direct the Legislature as to the method of determining gross receipts from Mississippi business. Hence appellee's returns had assigned as gross receipts from Mississippi business (a) its receipts from wholesale gas deliveries in the State, (b) receipts from oil properties in Mississippi, and (c) rentals from its houses on its compressor station properties. For example, for 1956 his former method of determining gross receipts from Mississippi business would be as follows:

receipts from wholesale gas deliveries in Mississippi, $1,324,944; income from oil properties in the State, $66,253; rentals from houses on compressor stations, $6,136; total gross receipts from Mississippi business, $1,397,333. This latter figure is the amount of gross receipts from Mississippi business found by the chancery court for 1956. Appellee took no cross-appeal, and apparently is satisfied with that method of fixing Mississippi gross receipts as a factor in the formula. The trouble with it is that it does not follow the statute.

This former method used by taxpayer in computing this part or percentage to be used in the apportionment formula, "gross receipts from Mississippi business," was changed by statute in 1956. Miss. Laws 1956, Chapter 412, Section 4; Miss. Code 1942, Recompiled, Section 9319. The second paragraph of the present act provides: "For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts."

In other words, a taxpayer which uses in its income tax returns a formula method of apportionment, and which is a multistate corporation, must determine its total gross receipts from Mississippi business (a) by applying to its total *unitary* receipts wherever located or received the ratio which would be achieved *by such income tax formula.* The result is the *unitary* Mississippi gross receipts, (b) to this is added any *nonunitary,* wholly local Mississippi receipts.

Unitary gross receipts from Mississippi business, under the statutory formula, are determined by a three-factor sub-formula: (a) The ratio of unitary gross revenue from Mississippi business to unitary gross revenue everywhere; (b) the ratio of real and tangible personal property in Mississippi to real and tangible personal property every-

where; and (c) the ratio of operating nonoffice salaries and wages in Mississippi to operating nonoffice salaries and wages everywhere. The average of these three percentages is then multiplied by appellee's total unitary gross receipts of $160,678,431. The result is $11,132,444, which are the *unitary* gross receipts from Mississippi business. To this figure is added the *nonunitary* gross receipts from Mississippi business, $66,253 (receipts from Mississippi oil properties) and $6,136 (rentals from compressor station housing), or a total of $72,389.

Unitary Gross Receipts from Miss. business	$11,132,444.
Nonunitary Gross Receipts from Miss. business	72,389.
Total of unitary and nonunitary gross receipts from Mississippi business	$11,204,833.

In short, this is the method of computing the aggregate of unitary and nonunitary gross receipts from Mississippi business. The statutory formula determines this factor in the foregoing manner, and in 1956, for example, the result is $11,204,833. This is the figure determined by the statute to be used in the second part of the numerator of the franchise tax apportionment formula.

Code Section 9319 as amended in 1956 manifestly represents an attempt by the Legislature to incorporate in the franchise tax apportion formula, *as the subsidiary percentage factor of "gross receipts from business carried on* in Mississippi," a reasonable and fair allocation to this state of both the *unitary* and *nonunitary* gross receipts attributable to Mississippi. The title to the section states that it pertains to "multistate corporations." The title to the Act, Chapter 412, Miss. Laws 1956, states in part that it is an act "to place all multistate corporations, both domestic and foreign, on the same basis of apportionment." The objective is equality and fairness of apportionment. The second paragraph of Section 9319 simply provides that in determining this subsidiary percentage in the overall for-

mula to be used in determining capital employed in Mississippi, the income tax apportionment formula should be used to determine Mississippi unitary gross receipts. To this is added nonunitary Mississippi gross receipts. Of course the tax is not a tax on apportioned gross receipts. The factor of gross receipts from Mississippi business is only one of several subsidiary percentages used in determining the capital used, invested or employed in this State.

Although appellee observes that this percentage represents an increase of 801% in this single subsidiary factor, the fact is that appellee's franchise tax is increased from the old formula for the year 1956 by only 11.83%, and for the year 1957 by 10.78%.

Appellee offered no evidence which would show that the prior method of computing its gross receipts from Mississippi business was even an approximately adequate determination of that subsidiary percentage factor. It offered no evidence to show that the new subsidiary percentage determination of gross receipts from Mississippi business taxed extraterritorial values. The mere fact that the three-factor formula for determining *unitary* gross receipts included as subsidiary percentages the percentage of property in the State, to property everywhere, and unitary gross revenue for Mississippi business to unitary gross revenue elsewhere, does not indicate a duplication of tax. The Legislature was warranted in concluding that, in order to determine adequately gross receipts from Mississippi business, it should include both unitary and nonunitary gross receipts in this State; and that a three-factor formula pertaining to gross revenue, property, and nonoffice salaries and wages was a more adequate method than the one formerly used.

IV.

The Legislature manifestly had in mind the established concept in the law of taxation of a unitary business. It is a term applied to concerns carrying on one kind of business,

component parts of which are too closely connected and necessary to each other to justify division or separate consideration, as individual units. Maxwell v. Kent-Coffey Mfg. Co., 204 N. C. 365, 168 S. E. 397, 399, 90 A. L. R. 476 (1933); 43 Words and Phrases (Perm. Ed., 1940), p. 256; 1959 Supp., 100. The test in determining what is a unitary business is whether all factors are essential to the ultimate realization of gain. The operations conducted in one state benefit and are benefited by the operations conducted in another state. If its various parts are interdependent and of mutual benefit, so as to form one integral part rather than several business entities, it is unitary.

The "unit rule" was originally developed to apportion property for earnings of such unitary enterprises as communication or transportation companies. Paul J. Hartman, in his "State Taxation of Interstate Commerce" (1953), page 245, after discussing apportioned capital stock taxes on such unitary enterprises, which of course would include multistate pipelines, concludes: "Those, of course, are companies whose proper[illegible]oes have real intangible value above its physical worth owing to its use as part of one entire enterprise, and whose earnings are incapable of separation into the respective portions derived from intrastate and interstate business. This 'unit rule' has thus been extended, wisely it seems, to corporations engaged in production and selling activities. While it may be more difficult to determine what rightfully belongs to a State when a sale is concerned in multistate sales than when the receipts are from multi-state transportation or communication, that does not mean there can be no constitutional allocation of income from multi-state enterprises whose income is derived from interstate sales. The Beauchamp and Evatt cases show clearly that such an allocation is possible."

The United States Supreme Court has recognized in a number of cases, under the interstate commerce and due process clauses, the validity of an apportioned capital

stock, franchise tax. Hartman reviews these decisions, and concludes that the Court has recognized the wisdom of this application of the unit rule. Hartman, ibid., pp. 238-246. Two leading cases are Ford Motor Company v. Beauchamp, 308 U. S. 331, 60 S. Ct. 273, 84 L. Ed. 304 (1939), rehearing denied, 308 U. S. 640, 60 S. Ct. 385, 84 L. Ed. 531; and International Harvester Company v. Evatt, 329 U. S. 416, 67 S. Ct. 444, 91 L. Ed. 390 (1936). Hartman analyzes accurately these cases as follows:

"An examination of a few late cases gives a clear picture of the appearance of a full-blown apportioned capital stock franchise tax and its workings in the total scheme of state taxation. *Ford Motor Company* v. *Beauchamp* not only shows the various factors that may go into the allocation formula, but it also represents an expansion of the idea of the value, to a corporation engaged in interstate commerce, of the privilege of doing local business, beyond the value of the property actually employed within the taxing State. The *Beauchamp* case recognized that the value of the privilege of doing business within the taxing State is increased taxwise by the use of property beyond the State. There, Texas levied an annual franchise tax on every domestic and foreign corporation authorized to do business in the State, measured by a charge upon such proportion of (a) the outstanding capital stock; (b) surplus and undivided profits on the corporation; plus (c) the long-term indebtedness, as the gross receipts from its Texas business bore to its total receipts. The taxpayer, Ford Motor Company, sent parts into Texas for assembly and intrastate sale to dealers. Ford's capital, as defined in the statute, was over $600,000,000. Total gross receipts for the year were over $800,000,000; Texas gross receipts were over $34,000,000. The capital allocable to Texas by the statutory formula was over $23,000,000; and the book value of all assets located in Texas was around $3,000,000. Payment was made under protest and suit instituted to recover the amount paid on the $20,000,000 in excess of the

book value of assets in Texas. The taxpayer contended that the tax was at war with the commerce clause in that it was levied on assets used in interstate business; and that it was offensive to the due process clause because it taxed activities and property outside the taxing State and over which it had no jurisdiction.

"Over these objections, the Supreme Court sustained the tax, holding that the statutory formula for arriving at the amount of the tax did not violate the Constitution since the measure of the tax simply recognized the increased value of the privilege of doing business within the State resulting from the use of property beyond the State. In short, the Court was satisfied that it was a legitimate franchise tax for the privilege of carrying on business in Texas. The exploitation by a foreign corporation of interstate opportunities under the protection and encouragement of a state government afforded a sufficient basis for the taxation. In levying the privilege tax, the State was simply placing a charge upon that privilege commensurate with the protection it afforded.

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"The late case of *International Harvester Co. v. Evatt* illustrates once more how capital stock may be used as a factor in the fiscal formula, along with other factors, in allocating to a State what fairly belongs to it in taxing a multi-state business organism. The taxpayer was a far-flung enterprise engaged in the business of manufacturing and marketing machinery. Ohio levied a franchise tax for the 'privilege of doing business.' Taxpayer owned and operated several factories, sales agencies, warehouses and retail stores in Ohio. Similar business houses owned by the taxpayer were located in other States. Some goods manufactured in other States were sold in Ohio. Taxpayer attacked the method by which the tax was calculated, as an alleged violation of the due process and commerce clauses. Under Ohio's allocation formula, the total value

of the taxpayer's issued capital stock was divided in half. One half of the value of the stock was multiplied by a fraction whose numerator was the value of all of taxpayer's property in Ohio and whose denominator was the total value of all of the taxpayer's property wherever located. The other half of the value of the capital stock was multiplied by a fraction whose numerator was the total value of 'business done' in Ohio and whose denominator was the total value of business done everywhere. The sum of these two products was used by Ohio as the tax base.

"The main objection to the method of calculation lay in the fact that the total value of business used as numerator in the second fraction included the proceeds of goods manufactured within, but sold outside, the taxing State, as well as the proceeds of goods manufactured in plants outside the State but sold in Ohio. Taxpayer contended that such inclusion violated the due process clause as well as the commerce clause in that it imposed a franchise tax on business done outside the State.

"A unanimous Court sustained the tax. It held that the tax did not constitute a levy on sales made outside the State in violation of the due process clause, since it was a franchise tax for the privilege of doing business in the State. The measure of the tax did not transform it to that of a tax on property outside the State. The tax was not inimical to the commerce clause since the apportionment formula used to ascertain the amount arrived at a fair conclusion as to what was the value of the intrastate business. Moreover, declared the Court: 'A state's tax law is not to be nullified merely because the result is achieved through a formula which includes consideration of interstate and out-of-state transaction in their relation to the intrastate privilege.'

"The *Beauchamp* and *Evatt* decisions give recognition to the national character of the modern corporation whose private property is scattered through several States, but whose use, management and balance sheet are unitary.

While apportionments between the intrastate and interstate activities have been upset upon a showing that they were materially contrary to fact, or that improper factors have been included, that argument had no basis in the *Beauchamp* and *Evatt* cases for the reason that the apportionment formula in each case was found to be fair; and the capital employed in any part of these multi-state businesses tended to make every other part of the business more valuable. The advantages of such large capital resources should be distributed fairly among all the States in which the corporation does business. In a large unitary enterprise such as the Ford Motor Company and International Harvester, property located outside the State, when correlated in use with property within the State, almost of necessity it seems, must affect the worth of the privilege within the State. So, in determining the value of the intrastate privilege, the weight given to the value of the property beyond the boundaries of the taxing State is simply a recognition of the value of the privilege granted within the taxing State."

Another leading case is Butler Brothers v. McColgan, 315 U. S. 501, 62 S. Ct. 701, 86 L. Ed. 991 (1941). The California franchise tax was upheld as assessed to Butler Brothers, an Illinois corporation, with wholesale distributing houses in several states, including one in San Francisco. The tax was computed by allocating to California a percentage of the corporation's net income. It was determined by averaging the percentages of three factors, property, wages, salaries, etc., and gross sales attributable to the San Francisco house and apportioned to all wholesale houses of the taxpayer. The Court recognized the unity of use and management of a business scattered through several states. It held that the three-factor formula contained appropriate ingredients of an apportionment formula; and the taxpayer failed to carry its distinct burden of showing by clear and cogent evidence that the apportioned franchise tax resulted in extraterritorial values being taxed. See also

Duluth South Shore and Atlantic Railroad Co. v. Michigan Corporation and Securities Commission, 353 Mich. 636, 92 N. W. 2d 22 (1958), motion to dismiss appeal sustained in ibid., 359 U. S. 310, 79 S. Ct. 876, 3 L. Ed. 2d 831; Stone v. Memphis Natural Gas Co., 201 Miss. 670, 29 So. 2d 268 (1947), affirmed in Memphis Natural Gas Co. v. Stone, 335 U. S. 80, 68 S. Ct. 1475, 92 L. Ed. 1832 (1947); International Harvester Co. v. Wis. Dept. of Taxation, 322 U. S. 435, 64 S. Ct. 1060, 88 L. Ed. 1373 (1943); Southern Package Corp. v. State Tax Commission, 195 Miss. 864, 15 So. 2d 436 (1944); 51 Am. Jur., Taxation, Sections 862, 863, 84 C. J. S., Taxation, Section 453, pp. 884-887.

Under Section 9319, the statutory taxable capital of appellee in Mississippi was $22,514,841 for the year 1956. The ratio of appellee's equity capital to its total capital was 32.36%. Appellee's total investment in real and tangible personal property in Mississippi in December 1955 was $81,531,070. Applying the stated ratio to that figure, the equity capital invested in Mississippi real and tangible personal property was $26,384,454. So for the year 1956 appellee had an equity capital in this State of almost $4,000,000 in excess of that which the statutory formula assigned to the State of Mississippi.

Applying the same method for the tax year of 1957, the statutory formula assigned taxable capital employed in Mississippi in the amount of $25,642,500. The amount of equity capital invested by appellee in Mississippi real and tangible personal property on December 31, 1956, was $36,922,403.31. Hence for 1957 appellee's equity capital invested in Mississippi was in excess of $11,000,000 over the statutory formula amount of taxable capital assigned to Mississippi.

The apportionment formula under Section 9319 results in an assignment to Mississippi for the year 1956, for example, of 8.4012% of appellee's capital stock, surplus, undivided profits and true reserves. With further reference to the reasonableness of this formula, it is noted that at least 10.9810% of the company's real and tangible personal

property is located in Mississippi, and 8.9789% of its operating nonoffice salaries and wages are assigned to Mississippi by appellee's own tax returns. These percentages are closely related and similar to the percentage of 8.4012% of appellee's capital used, invested or employed in Mississippi, under the statutory apportionment formula.

These comparable figures are pertinent and persuasive evidence of the reasonableness of the statutory allocation formula under Section 9319, which was designed to make a reasonable approximation of the capital used, invested and employed in Mississippi by this multistate, unitary enterprise. We think the formula reaches that objective, and results in a measurement of the franchise tax which is reasonably related to the privileges granted by the taxing state. 51 Am. Jur., Taxation Section 83. It is fairly calculated to assign to Mississippi that portion of taxpayer's capital employed in the State. 84 C. J. S., Taxation, Section 453, p. 885.

Moreover, appellee wholly failed to offer any clear and cogent evidence, or any substantial evidence whatever, to warrant a finding that the apportionment formula results in extraterritorial values being taxed. Railway Express Agency v. Va., 79 S. Ct. 411, 3 L. Ed. 2d 450 (1959); Cf. Northwestern States Portland Cement Co. v. Minn., and Williams v. Stockham Valve and Fittings, Inc., 79 S. Ct. 357, 3 L. Ed. 2d 421 (1959).

The franchise tax is not imposed on, or directly measured by, property, wages or gross receipts. These items are merely used in combination as component parts of a singel formula for the allocation of capital used, invested or employed in Mississippi. They are simply subsidiary percentages looking toward the end result of a fair allocation of appellee's capital employed in this State. State Tax Commission v. John H. Breck, Inc., 336 Mass. 277, 144 N. E. 2d 87 (1957).

Accordingly, the decree of the chancery court setting aside the order of the State Tax Commission and holding

the apportionment formula of Section 9319 to be invalid, is reversed. Judgment is rendered here for appellant, reinstating and affirming the order of the State Tax Commission of October 3, 1957, but modifying that order so as to award to appellee a refund of $710.00, which appellant admitted in its answer in the trial court appellee was entitled to receive.

REVERSED AND JUDGMENT RENDERED HERE FOR APPELLANT, REINSTATING AND AFFIRMING ORDER OF STATE TAX COMMISSION, AS MODIFIED.

McGEHEE, C. J., AND ROBERDS, LEE, KYLE, ARRINGTON AND GILLESPIE, JJ., CONCUR.

IN THE SUPREME COURT OF MISSISSIPPI

No. 41,264

MISSISSIPPI STATE TAX COMMISSION

vs.

TENNESSEE GAS TRANSMISSION COMPANY

HALL, Justice, dissenting:

I respectfully dissent from the holding of the majority in this case. It is somewhat astonishing to me that the majority of the Court has written 29 pages and not one time has cited a single authority dealing specifically with the tax formula here involved. The majority concede that the application of the formula prescribed by the 1956 law results in an increase of 801 percent in one of the factors going into this formula, but dismisses this with the statement that the appellee's franchise tax for the year 1956 is increased by only 11.83 percent, and for the year 1957 by 10.78 percent. Nowhere does the controlling opinion undertake to explain or excuse this 801 percent increase in

one of the subsidiary factors going into the formula as the same works out and is applied in actual figures. As I see it, the only reason that the controlling opinion does not deal further with this unexplained and outrageously high percent in this subisdiary factor is that there is no authority to sustain it.

Instead of citing a single authority specifically in point, the majority contents itself with a lengthy quotation from a little booklet by Professor Paul J. Hartman, published in 1953, and in that quotation there is elaborated only the general principle that in dealing with an apportioned capital stock franchise and its working in the total scheme of state taxation, an apportionment formula may be adopted, but nowhere does the booklet in question undertake to justify such an apportionment formula as is prescribed by the 1956 law.

In the case of Butler Brothers v. Chas. J. McColgan as Franchise Tax Commissioner of the State of California, 315 U. S. 501, 86 L. Ed. 991, the Supreme Court of the United States was not by any means dealing with such a formula as we have before us in this case. As pointed out by Justice Douglas in his opinion in that case, "We read the statute as calling for a method of allocation which is 'fairly calculated' to assign to California that portion of the net income 'reasonably attributable' to the business done there. The test, not here challenged, which has been reflected in prior decisions of this Court, is certainly not more exacting. • • • Hence if the formula which was employed meets those standards, any constitutional question arising under the Fourteenth Amendment is at an end."

The majority opinion cites the case of Ford Motor Co. v. Tom L. Beauchamp, Secretary of State of the State of Texas, 308 U. S. 331, 84 L. Ed. 304. That case does not deal with or in any manner approach the question which we have here. It was there said: "The exploitation by foreign corporations of intrastate opportunities under the protection and encouragement of local government offers

a basis for taxation as unrestricted as that for domestic corporations. In laying a local privilege tax, the state sovereignty may place a charge upon that privilege for the protection afforded. When that charge, as here, is based upon the propertion of the capital employed in Texas, calculated by the percentage of sales which are within the state, no provisions of the Federal Constitution is violated." That case is no authority whatsoever on the question which we have here.

The controlling opinion also cites Memphis Natural Gas Co. v. A. H. Stone, Chairman, State Tax Commission of Mississippi, 335, U. S. 80, 92 L. Ed. 1830. That case was before the United States Supreme Court on an appeal from this Court as reported in 201 Miss. 670, 29 So. 2d 268. The U. S. Supreme Court said: "A glance at the activities, named above, listed by the Supreme Court of Mississippi, shows that there is no possibility of multiple taxation through the same exactions by other states. The amount of the tax is reasonable. It is properly apportioned to the investment in Mississippi.

"However, a state tax upon a corporation doing only an interstate business may be invalid under our decisions because levied (1) upon the privilege of doing interstate business within the state, or (2) upon some local event so much a part of interstate business as to be in effect a tax upon the interstate business itself." We have no such situation in the case now before us as was presented by the Memphis Natural Gas case.

I readily agree with Professor Hartman that a proper apportionment formula may be adopted and used, so long as the same does not result in unjustly increasing the Mississippi tax and so long as the same does not tax in Mississippi a substantial portion of the income from other states without duplicating the same.

Mention is made in the controlling opinion of the fact that the appellee owns an interest in some Mississippi oil wells, which are not operated by it, and also the fact that

it owns some compressor stations in Mississippi and four pumping stations within the state and approximately 925 miles of pipeline and a number of residences for its employees in connection with the operation of the compressor stations, but it is undisputed that the severance tax due the state on the oil produced is paid and the ad valorem taxes on all of the tangible property, real and personal, including the pipeline is being regularly paid and there is no contention that the state is losing any ad valorem taxes whatsoever on these several properties.

I am unable to bring myself to the view that simply because an apportionment formula may be used is no reason whatsoever for the apparent holding that just any apportionment formula does not offend the Constitution.

HOLMES, J., joins in this dissent.

APPENDIX B

IN THE CHANCERY COURT OF THE FIRST JUDICIAL DISTRICT OF HINDS COUNTY, MISSISSIPPI

No. 53,152

TENNESSEE GAS TRANSMISSION COMPANY, *Petitioner*

vs.

MISSISSIPPI STATE TAX COMMISSION, *Respondent*

Opinion of the Court

This case involves an appeal from a decision of the Mississippi State Tax Commission denying the Tennessee Gas Transmission Company refunds of alleged excess franchise tax payments made for the years 1956 and 1957.

The franchise taxes levied for the years 1956 and 1957 were computed under the provisions of Section 9319, Mississippi Code of 1942 as amended by Paragraph 4 of Chapter 412 of the Laws of Mississippi of 1956.

The Petitioner contends that the excess franchise tax payment for 1956 amounts to $5,412 and the Respondent admits only $710 of this amount, so the amount in controversy as of September 14, 1956, the date of payment, is $4,702.

The Petitioner contends that the excess franchise tax payment for the year 1957 amounts to $7,143.

On October 3, 1957 the State Tax Commission entered its order denying the refunds requested and an appeal was perfected to this Court.

The Tennessee Gas Transmission Company is a Delaware corporation having its principal offices in Houston, Texas. It has been qualified to do business in the State of Mississippi since July, 1947. Its predecessor, Tennessee Gas & Transmission Company, was qualified from November, 1943 through July, 1947.

Petitioner's books and records are kept at its office in Houston, Texas, and all contracts entered into by Petitioner

are made and executed in Houston, Texas. Petitioner owns and operates through the State of Mississippi natural gas transmission pipelines through which it transmits natural gas gathered in the States of Texas and Louisiana through Arkansas, Mississippi, Tennessee and on to destinations in Northern States. It maintains in Mississippi compressor stations, meter stations and maintenance employees. It had, during the years 1956 and 1957, approximately 925 miles of pipelines within the State of Mississippi and it operated 4 compressor stations, 18 meter stations and approximately 45 automobiles, trucks and trailers. It also owns dwelling houses on its compressor station properties used by its operating and maintenance employees.

Petitioner makes no direct sales or deliveries of gas in the State of Mississippi but does deliver some wholesale quantities of gas in the State of Mississippi. It owns a partial interest in 13 oil wells in Mississippi, none of which it operates.

The business of Petitioner within the State of Mississippi is such that Petitioner can clearly show by the conduct of its operation and by its books and records that its natural gas pipeline transmission system is conducted solely, distinctly and separately from its oil holdings in Mississippi and Petitioner could discontinue its oil holdings in Mississippi without also withdrawing from its natural gas pipeline transmission business.

The gross revenue from Petitioner's oil holdings in Mississippi for the franchise tax years 1956 and 1957 was $66,253 and $69,318 respectively. The rental revenue from its dwelling houses on compressor station properties, which houses were used by its employees, amounted to $6,136 for the franchise tax year 1956 and $7,981 for the franchise tax year 1957.

Power used to operate Petitioner's gas transmission compressor stations in Mississippi is generated from gas taken from Petitioner's gas transmission lines at its four pumping stations within the State.

Petitioner has invoked the statutory grant of eminent domain provided by the Laws of Mississippi in the courts of the State of Mississippi on several occasions. Petitioner has paid to the State of Mississippi and political subdivisions thereof all ad valorem taxes assessed and due against its properties within Mississippi. The assessed value of Petitioner's property in the State of Mississippi for the year 1956 was $19,115,150 and for the year 1957 was $21,250,000.

The Petitioner has no quarrel with Section 9319 of the Mississippi Code of 1942 as it existed from 1934 through 1955. If there were any serious contention as to the constitutionality of this portion of the franchise tax law, it has been determined in *Memphis Natural Gas Company* v. *A. H. Stone, Chairman, State Tax Commission of Mississippi*, found in 335 U. S. 80, 92 L. Ed. 1832.

The Petitioner does contend that the amendment to this law made in 1956 provides an invalid, arbitrary and discriminatory formula for computing the franchise tax and places an undue burden on interstate commerce by taxing the interstate receipts of Petitioner. The Petitioner further contends that the amendment of 1956 adds to the prior formula for computation of the franchise tax of multistate corporations a factor for determination of gross receipts attributable to the State of Mississippi that is arbitrary, unreasonable and discriminatory and unduly burdens the interstate commerce business of Petitioner by taxing interstate commerce receipts which are subject to tax in other States, thereby subjecting Petitioner's business to double or duplicated taxes.

Section 9319, *Mississippi Code of* 1942, *as amended by the Mississippi Legislature* in 1956, reads as follows:

> "In the case of organizations doing business both within and without Mississippi, the value of the capital employed in this state shall be determined by first computing the ratio between (1) the real and tangible

personal property owned or used in Mississippi and gross receipts from business carried on in Mississippi and (2) the total real and tangible personal property and gross receipts wherever located and from whereever received. Said ratio shall then be applied to the total capital stock, surplus, undivided profits and true reserves and the result of that application shall be the capital employed in this state. Provided, however, that the amount of the determined capital in Mississippi shall in no case be less than the assessed value of the property of the organization for the year preceding the year in which the return is due.

"For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts."

The offending portion of the amended law is contained in the last paragraph above.

Petitioner is a multistate corporation which uses the formula method of apportionment in making income tax returns to the State of Mississippi and, therefore, is required by the last paragraph of the amended act to determine the factor of gross receipts from business carried on in Mississippi, which appears in the numerator of the formula set out in the first paragraph of the act, by applying to total unitary receipts the ratio achieved by the super-imposed income tax formula and by adding to the results of such application any nonunitary receipts. The Petitioner contends that this requirement makes the tax unreasonable, arbitrary and discriminatory, and an undue burden on interstate commerce.

Under both the old and the amended acts the numerator of the formula consists of "real and tangible personal property owned or used in Mississippi plus gross receipts from business carried on in Mississippi" and the denominator of the formula is "total real and tangible personal property and gross receipts wherever located and from wherever received." The ratio thus achieved is then applied to the total capital stock, surplus, undivided profits and true reserves, and the result of that application is the capital employed in Mississippi.

Using the formula in effect prior to the amendment of 1956, the gross receipts from Petitioner's business carried on in this State for the year 1956 were $1,397,333. This figure is composed of $1,324,944 (receipts from wholesale gas deliveries in Mississippi in interstate commerce) plus $66,253 (receipts from oil properties) plus $6,136 (rentals from compressor station dwelling houses.)

In computing the refunds claimed for the franchise tax years 1956 and 1957, the Petitioner has used in the numerator of the formula for gross receipts in Mississippi only the sum of $72,389 rather than $1,397,333, and for the franchise tax year 1957 has used as the gross receipts factor for Mississippi only $77,299, which figures for 1956 and 1957 are composed of receipts from oil properties plus rentals from compressor station houses. If the gross receipts factor for 1956 included the $1,324,944, representing the proceeds from wholesale deliveries of gas in Mississippi (which the Supreme Court of the United States says are proceeds of interstate deliveries), then the refund to which Petitioner contends it is entitled would be $4,758, and if the gross receipts factor included the $4,130,671, representing wholesale deliveries of gas in Mississippi for the franchise tax year 1957, then the refund to which the Petitioner contends it would be entitled would be $4,989.

Now there has been superimposed upon this formula, which existed from 1934 through 1955 for the computation of the franchise tax due, a formula method of apportion-

ment set up by regulations of the State Tax Commission for multistate corporations to use in making income tax returns to this State. The method of determining Mississippi gross receipts for multistate corporations is thus set up as follows:

A. % of Total Unitary Gross Receipts Computed by Miss. Income Tax

Allocation Ratio:

Ratio for Natural Gas Transmission Lines:

1. $\frac{\text{Unitary Gross Revenue from Miss. Business}}{\text{Unitary Gross Revenue Everywhere}} = \%$

2. $\frac{\text{Real and Tangible Personal Property in Miss.}}{\text{Real and Tangible Personal Property Everywhere}} = \%$

3. $\frac{\text{Operating Non-Office Salaries and Wages in Miss.}}{\text{Operating Non-Office Salaries and Wages Everywhere}} = \%$

Average of Percentages = %

B. Average % (A) X Total Unitary Gross Receipts = Unitary Gross Receipts from Miss. Business.

C. Unitary Gross Receipts from Miss. Business Plus Non-Unitary Gross Receipts from Miss. Business = Gross Receipts from Miss. Business.

Using actual figures in the formula as it existed prior to May 1, 1956, the 1956 franchise tax would be $39,362 and is arrived at, as follows:

$$\frac{\$81,531,070 \text{ plus } \$1,397,333}{\$904,030,377 \text{ plus } \$199,809,756} = 7.5127\%$$

7.5127% X $263,763,362 = $19,815,750 X $2.00 (Tax Rate) = $39,362.

Using actual figures in the formula as it was amended in 1956, the franchise tax would be $44,320 and is arrived at, as follows:

$$\frac{\$81,531,070 \text{ plus } \$11,204,833}{\$904,030,377 \text{ plus } \$199,809,756} = 8.4012\%$$

8.4012% X $263,763,362 = $22, 159,288 X $2.00 (Tax Rate) = $44,320.

A.

1. $\frac{\$ \quad 1,324,944}{\$160,565,026} = .8252\%$

2. $\frac{\$ \ 80,088,971}{\$729,342,422} = 10.9810\%$

3. $\frac{\$ \cdot \quad 961,851}{\$ \ 10,712,397} = 8.9789\%$

$20.7851\% \div 3 = 6.92.4\%$

B. 6.9284% X $160,678,431 = $11,132,444

C. $11,132,444 plus $66,253 plus $6,136 = $11,204,833.

It will thus be seen that under the formula as it existed prior to May 1, 1956, the gross receipts from business carried on in Mississippi is $1,397,333, whereas the gross receipts under the complicated income tax formula superimposed by the 1956 amendment, amount to $11,204,833, or an 801% increase. It is interesting to note that this result is achieved not by virtue of an 801% increase in the gross receipts of this multistate corporation generally, but is achieved for the same year, 1956, by using the same figures in the income tax formula superimposed upon the existing franchise tax formula. Each of these formulas uses the ratio of real and tangible personal property owned or used in Mississippi to the total real and tangible personal property wherever located. This ratio is thus used twice in each computation of the franchise tax.

Another factor which has been taken into consideration twice in the franchise tax formula and the income tax formula superimposed thereon is the total unitary gross reve-

nue. Thus we have two factors in the complicated formulas which are duplicated and compounded, the real and tangible personal property in Mississippi and the real and tangible personal property everywhere, and the total unitary gross revenue.

Before May 1, 1956 the gross receipts from Mississippi business were $1,397,333 and after May 1, 1956, using the income tax formula superimposed upon the franchise tax formula, the gross receipts from Mississippi business are $11,204,833, an increase of 801% in the gross receipts factor.

The mere stating of the results achieved by applying these two separate formulas, now combined into one, to the same sets of figures for the same year, indicates to this Court very clearly and beyond any doubt that Mississippi is being allocated a larger part of the gross receipts from Petitioner's interstate business than it is entitled to under any reasonable and fair apportionment; that thereby an undue burden is being placed on interstate commerce, and that there is or can be duplication in taxes on the same gross receipts from interstate commerce in other States through which Petitioner's interstate gas transmission lines run. This is the very vice that the Supreme Court of the United States decided did not exist in the case of *Memphis Natural Gas Company* v. *Stone*, 335 U. S. 80, 92 L. Ed. 1832. The Supreme Court of the United States, in affirming the decision of the Mississippi Supreme Court, said:

> *"A glance at the activities named above, listed by the Supreme Court of Mississippi, shows that there is no possibility of multiple taxation through the same exactions by other states. The amount of the tax is reasonable. It is properly apportioned to the investment in Mississippi.*
>
> . . . . . .
>
> *"This tax is not an unapportioned tax on gross receipts from the commerce itself. It is measured by a*

proportion of the capital employed within the State. It cannot be duplicated in other states." (Emphasis added here).

Mr. Justice Rutledge of the Supreme Court of the United States in his special concurring opinion said:

"It is non-discriminatory, that is, places no greater burden upon interstate commerce than the state places upon competing intrastate commerce of like character, is duly apportioned, that is, does not undertake to tax any interstate activities carried on outside the state's borders; and cannot be repeated by any other state.

• • • • • • • • • •

"The apportionment, however, guards it from the vice of taxing commerce done in other states and thus also from multiplication by them." (Emphasis added here).

In the case at bar there is not only a possibility, but also a great probability, of multiple taxation through the same exactions on the same gross receipts in other States. By taking into consideration as a factor in the now greatly complicated formula a greater proportion of gross receipts from interstate business than Mississippi is entitled to under any reasonable method of apportionment, a greater burden is placed upon interstate commerce than the State places upon competing intrastate commerce of like character. By thus compounding and duplicating factors in the franchise tax formula, as amended by the addition of the income tax formula for multistate corporations, a franchise tax results which cannot be said to be duly apportioned, constitutes a tax on interstate activities carried on outside the State's borders, and can be duplicated by other States on the same gross receipts from interstate business.

For the reasons herein enumerated, the mandatory requirement, contained in Section 4, Chapter 412, Laws of the

State of Mississippi enacted in 1956, that "For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts" is unconstitutional because it violates the Commerce Clause (Article I, Section VIII) of the Constitution of the United States.

The Petitioner is entitled to a refund of $4,758 on the 1956 corporate franchise tax paid and $4,989 on the 1957 corporate franchise tax paid.

Court costs will be assessed against the Respondent.

STOKES V. ROBERTSON, JR., Chancellor

APPENDIX C

SUPREME COURT OF THE STATE OF MISSISSIPPI

Monday, December 14, 1959, Court Sitting

41,264

MISSISSIPPI STATE TAX COMMISSION

vs.

TENNESSEE GAS TRANSMISSION COMPANY

This cause having been submitted at a former day of this Term on the record herein from the Chancery Court of Hinds County, First District and this Court having sufficiently examined and considered the same and being of the opinion that there is error therein doth order and adjudge and decree that the decree of said Chancery Court of January 27, 1959 setting aside the order of the State Tax Commission and holding the apportionment formula of Section 9319 Code of 1942 to be invalid, is reversed and decree is rendered here for the Mississippi State Tax Commission, reinstating and affirming the order of the State Tax Commission of October 3, 1957, but modifying that order so as to award the appellee, Tennessee Gas Transmission Company a refund of $710.00 and as so modified the said order is affirmed. It is further ordered and adjudged and decreed that the appellant do have and recover of and from the appellee all of the costs in this Court and in the Court below to be taxed, etc.,

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APPENDIX D

SUPREME COURT OF THE STATE OF MISSISSIPPI

Monday, February 1, 1960, Court Sitting

MISSISSIPPI STATE TAX COMMISSION

41,264

v.

TENNESSEE GAS TRANSMISSION COMPANY

This cause this day came on to be heard on the suggestion of error filed herein and this Court having sufficiently examined and considered the same and being of the opinion that the same should be overruled, doth order and adjudge that said suggestion of error be and the same is hereby overruled.

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APPENDIX E

Mississippi Code of 1942. Recompiled. As Amended. 1956

TITLE 37

PRIVILEGE AND EXCISE TAXES

CHAPTER 2

CORPORATION FRANCHISE

Sections

9313. Tax on domestic corporations.
9314. Tax on foreign corporations.
9315. When payable—returns.
9317. Basis of valuation.
9318. Book value.
9319. Multistate corporations.
9321. Repealed.
9325. Penalty.
9326. Notice of delinquency—levy upon property.
9328. Appeals.
9329. Deficiency assessment.
9330. Refunds.
9332. Saving clause.
9334. Verification.

§ 9313. *Tax on domestic corporations.*

There is hereby imposed, to be paid and collected as hereinafter provided, a franchise or excise tax upon every corporation, association, or joint stock company for pecuniary gain, having privileges not possessed by individuals, and having capital stock represented by shares, now existing in this state, or hereafter organized, created or established, under and by virtue of the laws of the State of Mississippi, equal to $2.00 for each $1,000.00 or fraction thereof, of the value of the capital used, invested or employed in the exercise of any power, privilege or right enjoyed by such organization within this state, except as hereinafter provided. It being the purpose of this section to require the payment to the state of Mississippi, this tax for the right granted by the laws of this state to exist as such organization, and

enjoy, under the protection of the laws of this state, the powers, rights, privileges and immunities derived from the state by the form of such existence.

SOURCES: Laws, 1955, Ex ch 118, § 1, eff April 1, 1955.

§ 9314. *Tax on foreign corporations.*

For the year 1955 and annually thereafter, there shall be and is hereby imposed, levied and assessed upon every corporation, association or joint stock company, as hereinbefore defined, organized and existing under and by virtue of the laws of some other state, territory or country, or organized and existing without any specific statutory authority, now, or hereafter doing business within this state, as hereinbefore defined, a franchise or excise tax equal to $2.00 of each $1,000.00 or fraction thereof of the value of capital used, invested or employed within this state, except as hereinafter provided. It being the purpose of this section to require the payment of a tax by all organizations not organized under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the state.

SOURCES: Laws, 1955, Ex ch 118, § 2, eff April 1, 1955.

§ 9315. *When payable—returns.*

(a) *When and how payable.*—The taxes imposed, levied and assessed under the provisions of this act, shall be annual taxes payable on or before the fifteenth day of July, and shall be paid with, and on the basis of, returns filed with the commissioner, who shall be the chairman of the state tax commission. The return when filed shall contain such information as may be required by the commissioner and shall be accompanied by a remittance acceptable to the commissioner in the sum determined to be due by the return, plus statutory increases, if any.

(b) *Measuring date.*—The tax shall be based upon the capital of the organization as at the close of its year,

whether calendar or fiscal, immediately preceding the due date of the return; provided, that if the last preceding year ends on either May 31st or June 30th, the tax shall be based upon the capital of the organization as of the next to last fiscal year closing.

(c) *Accrual date.*—The tax is assessed for the year, whether calendar or fiscal, immediately following the year by the close of which the tax is measured, and shall accrue on the day following the measuring date.

(d) *Initial return.*—In the case of an organization newly subject to this act, its initial return shall be due on the July 15th immediately following the end of its first accounting period after becoming subject to this act; provided, that if said first accounting period ends on either May 31st or June 30th, its initial return shall be due on the second July 15th following the end of said first accounting period; and provided further, that an accounting period, for the purpose of this act, cannot exceed twelve (12) months in length regardless of whether or not the organization has actually commenced business or is actually engaged in business; and provided further, that if an organization adopts no regular accounting period within twelve (12) months from the time it becomes subject to this act, then it will be assumed, for the purpose of this act, that said organization is on a calendar year basis.

(e) *Final return.*—An organization which begins the year, whether calendar or fiscal, for which the tax is due, shall be liable for payment of the full tax notwithstanding its dissolution or withdrawal prior to the end of said year or prior to the due date of the return.

SOURCES: Laws, 1956, ch 412, § 1, eff May 1, 1956.

§ 9317. *Basis of valuation.*

The tax imposed, levied, and assessed, under the provisions of this act, shall be calculated on the basis of the value of the capital employed in this state for the year preceding

the date of filing the return, whether a calendar year, or fiscal year, except where otherwise provided in this act, measured by the combined issued and outstanding capital stock, surplus and undivided profits; provided, that in computing capital, surplus and undivided profits, there shall be included all true reserves, including all reserves other than for definite known fixed liabilities which do not enhance the value of assets; and amounts designated for the payment of dividends shall not be excluded from such calculations, until such amounts are definitely and irrevocably placed to the credit of stockholders, subject to withdrawal on demand; provided, however, there shall not be included in the value of the capital stock any sums representing debts, notes, bonds and mortgages due and payable; nor depreciation reserves, bad debt reserves, nor reserves representing valuation accounts. But in no case shall the franchise tax so computed be less than ten dollars ($10.00) for the period covering which the return is filed. In no case shall the determined capital in Mississippi be less than the assessed value of the real estate and tangible personal property in Mississippi for the year preceding the year in which the return is due.

SOURCES: Laws, 1956, ch 412, § 2, eff May 1, 1956.

§ 9318. *Book value.*

In all cases for the purpose of determining the amount of capital, the book value as regularly employed in conducting the affairs of the corporation shall be accepted as prima facie correct as to the true capital of the organization.

If any organization has cause to believe that the calculations required on the return prescribed are not sufficiently informative or do not properly reveal the true franchise or excise tax to be due as measured by the value of the capital of that organization, or shall feel aggrieved at the requirements upon it for information or tax, then such organization shall have the right to file with the commissioner a petition and affidavit signed as returns are by this

act required to be signed, setting forth the facts showing the true value of its capital.

SOURCES: Laws, 1956, ch 412, § 3, eff. May 1, 1956.

§ 9319. *Multistate corporations.*

In the case of organizations doing business both within and without Mississippi, the value of the capital employed in this state shall be determined by first computing the ratio between (1) the real and tangible personal property owned or used in Mississippi and gross receipts from business carried on in Mississippi and (2) the total real and tangible personal property and gross receipts wherever located and from wherever received. Said ratio then shall be applied to the total capital stock, surplus, undivided profits and true reserves and the result of that application shall be the capital employed in this state. Provided, however, that the amount of the determined capital in Mississippi shall in no case be less than the assessed value of the property of the organization for the year preceding the year in which the return is due.

For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts.

SOURCES: Laws, 1956, ch 412, § 4, eff May 1, 1956.

§ 9321. *Repealed* by Laws 1956, ch. 412, § 11; eff. May 1, 1956.

§ 93[redacted] *Penalty.*

Any organization required by this act to file a return or pay a franchise or excise tax which shall fail or neglect to file such return or to pay such tax when due, shall be required to pay interest on the amount due at the rate of one half of one percent (½ of 1%) per month for each month of delinquency or part thereof, and if such failure or

refusal be wilful there shall be assessed and collected by the commissioner in addition to the amount of tax and interest due, a penalty of twenty-five per centum (25%) of the amount of tax determined to be due. The commissioner may grant a reasonable extension of time beyond the statutory due date within which to file the return and pay the tax due when it is shown to the satisfaction of the commissioner that good cause for such extension exists, and such extension shall extend the statutory due date for the purposes of this act. All such extensions granted shall carry interest on the amount due by the return at the rate of one half of one percent (½ of 1%) per month or fractional part thereof. No extension shall be granted for a period of more than sixty (60) days. Any organization, or any officer or agent of such organization who shall wilfully refuse or neglect to comply with or violate any of the provisions of this act, shall be guilty of a misdemeanor and upon conviction thereof shall be punished by a fine of not more than one thousand dollars ($1,000.00) or by imprisonment in the county jail of not more than six (6) months, or by both such fine and imprisonment in the discretion of the court.

SOURCES: Laws, 1956, ch 412, § 5, eff May 1, 1956.

§ 9326. *Notice of delinquency—levy upon property.*

If any organization, subject to the tax imposed by this act, shall not have filed with the commissioner the return as required by this act, on or before the statutory due date thereof, then the commissioner shall dispatch to that organization a notice of delinquency by regular mail, and the record of the commissioner shall be prima facie record of proof that the same was mailed by deposit in the United States post office. Such notice of delinquency shall state the specific violation of this act, and offer the organization a period of not more than thirty (30) days from the date thereof, within which to remedy such delinquency. If no return be filed by the organization and the tax shown thereon to be due be not paid in response to such notice

on or before the expiration of the thirty (30) days allowed in the notice of delinquency, then the commissioner shall determine from the best information available the amount of tax properly due. The organization shall be notified by registered mail that such procedure has been followed; and the result thereof, showing the calculations of the commissioner, shall be set forth in the registered notice of assessment. The organization shall be allowed a period of time not to exceed thirty (30) days from the date of such registered assessment within which to pay such tax found to be due, together with interest, increases and penalties thereon, or show cause why the same should not be collected.

After the expiration of the thirty-day period allowed, after registered notice of the assessment made by the commissioner has been mailed to such organization, should said organization fail or refuse to pay the tax demanded and determined by said assessment, together with all penalties and interest shown to be due; or fail to file a protest against said assessment or appeal therefrom, then the commissioner, over his seal and signature as chairman of the state tax commission, may issue a warrant to the sheriff of any county of the state, commanding him to levy upon and sell the real and personal property of the debtor or organization owing the same, found within his county, for the payment of the amount of taxes, penalties and interest shown to be due, together with the cost of executing and entering the warrant, and to return such warrant to the commissioner and pay to the commissioner the money collected by virtue thereof, by a time to be therein specified not more than thirty (30) days from the date of the warrant. The commissioner shall forward a copy of said warrant to the circuit clerk of the county; and thereupon, the circuit clerk shall enter on the judgment roll in the column for judgment debtors, the name of the taxpayer mentioned in the warrant, and in appropriate columns, the amount of the tax or portion thereof and damages for which the warrant is issued; and the date when such copy is filed; and there-

upon, the amount of such warrant so docketed shall become a lien upon the title to and interest in real and personal property, including choses in action, of the organization against which it is issued, in the same manner as a judgment duly enrolled in the office of such clerk. The said sheriff thereupon shall proceed upon the same in all respects, with like effect, and in the same manner prescribed by law in respect to executions issued against property upon judgments or attachment proceedings, of a court of record; and shall be entitled to the same fees for his services in executing the warrant as allowed by law for like services, to be collected in the same manner as provided for like services.

The commissioner is hereby authorized to pay the circuit clerk's fee for enrolling warrants out of funds appropriated by the legislature to defray expenses of the state tax commission.

If any sheriff shall fail to execute and return any warrant directed to him as herein provided on the return day thereof, the State of Mississippi shall be entitled to recover judgment against the sheriff and the sureties on his official bond for the amount of the warrant, and all costs, with lawful interest thereon until paid, together with ten per centum (10%) of the full amount of the judgment for damages, to be recovered by a suit against the sheriff and his sureties by the attorney general at the request of the commissioner.

After the expiration of the thirty-day period allowed, after registered notice of the assessment made by the commissioner has been mailed to such organization, if such organization shall fail or refuse to pay the tax demanded and determined by the commissioner, together with all penalties and interest shown to be due, or if such organization shall fail to file a protest against such assessment, or appeal therefrom, then the commissioner, in addition to the other authority conferred upon him in this act, may suspend the right of such organization to perform any right acquired by the form of the organization, if a domestic organization, or

suspend the right to do business in the state, if such organization is authorized under the laws of some other state or country, or doing business without specific statutory authority. Immediately after such suspension has been ordered by the commissioner, such organization shall be notified thereof, by mailing a notice of suspension to such organization at the last known post office address thereof, by registered mail. Whereupon, the commissioner shall notify the secretary of state of such suspension, in writing, and the secretary of state shall immediately make proper notation on the margin of such record in his office as will provide public notice of such suspension.

SOURCES: Laws, 1956, ch 412, § 5, eff May 1, 1956.

§ 9328. *Appeals.*

Every organization shall have the right of appeal to the commissioner from a notice of delinquency provided for in section 15 (9326) of this act, from an assessment of tax provided for in section 15 (9326) of this act, from an assessment of additional tax provided for in section 18 (9829) of this act, and for the refund of taxes overpaid provided for in section 19 (9330) of this act. Opportunity for a hearing before the commissioner shall be granted and a decision thereon shall be made as quickly as practicable, and should the organization be aggrieved at such decision, then the organization shall have the right to appeal to the state tax commission in formal session, on the basis of a prayer for review and revision of the taxes assessed or proposed against it. The decision of the state tax commission in every case shall be rendered within a period of time not to exceed ten (10) days from the date of the final hearing and shall be final unless, within thirty (30) days from the receipt of notice from the state tax commission of such decision, the appealing organization shall file a petition in the chancery court of Hinds County, First Judicial District, requesting a hearing of the case on its merits, which petition shall be a concise statement of the facts involved. The petition shall be accompanied with a bond, to be approved

by the clerk of said court, in a sum double the amount in controversy, conditioned to pay the judgment of the court. Both parties to such action shall have the right of appeal to the supreme court, as in other cases.

SOURCES: Laws, 1956, ch 412, § 6, eff May 1, 1956.

§ 9329. *Deficiency assessment.*

As soon as practicable after the return is filed, the commissioner shall examine the same and if after the examination, it shall be determined from the facts that the tax imposed and collected is erroneous, then the same shall be recomputed upon the basis of such facts. If the amount so determined is in excess of that already paid, then the deficiency, plus interest at the rate of one half of one per centum (½ of 1%) per month, shall be immediately assessed against the taxpayer and collected in accordance with the provisions of this act. In the case of a deficiency assessment, the organization shall be notified by the commissioner of his findings in the examination, and offered a period of not more than thirty (30) days within which to appear and show cause why the said deficiency should not be forthwith collected and paid; and if the organization shall fail or refuse to avail itself of the thirty-day period allowed in the deficiency assessment, then the commissioner shall proceed to issue to the organization a demand for the taxes determined to be due, which demand shall be final except as to the procedure provided in this act for prayers for review and revision of taxes assessed.

In the event such assessment is not paid, when such final demand is made, the taxpayer shall be subject to the same penalties as are provided herein for failure to pay other taxes when due, and the commissioner may proceed to enforce the collection of such assessment and penalties in the same manner as is provided for enforcing the collection of delinquent taxes determined to be due under the provisions of this act.

SOURCES: Laws, 1956, ch 412, § 7, eff May 1, 1956.

§ 9330. *Refunds.*

If the amount already paid under the requirements of this act is in excess of the amount determined to be properly due, then the amount of such overpayment shall be credited to the organization, and having been so credited shall be refunded to the extent of its excess over any debts outstanding against the said organization for taxes imposed by this act. Such refund shall be effected in the manner provided in section 9979, code of 1942.

An organization may appeal to the commissioner for a refund of any tax overpayment at any time within three (3) years from the time of said payment and a final determination shall be made in the same manner as is provided in this act for appeals from assessments.

SOURCES: Laws, 1956, ch 412, § 8, eff May 1, 1956.

§ 9332. *Saving clause.*

Nothing in this act shall affect or defeat any claim, assessment, appeal, suit, right or cause of action for taxes due, under chapter 121, laws of 1934 [§ 9312 et seq.], as amended, prior to the date on which this act becomes effective, whether such assessment, appeal, suit, claim or action shall have been begun before the date on which this act became effective, or shall thereafter be begun; and the sections of chapter 121, laws of 1934 [§ 9312 et seq.], as heretofore amended, which are amended or repealed by this act are expressly continued in full force, effect and operation for the purpose of assessment and collection of any taxes due under any such laws prior to the date on which this act becomes effective, and for the imposition of any penalties, forfeitures or claims for a failure to comply therewith.

SOURCES: Laws, 1956, ch. 412, [§ 12, eff May 1, 1956.

§ 9334. *Verification.*

Every return filed under this act must be verified by a written declaration that it is made under the penalties of perjury and must be signed by the secretary of the organization and by the president or one other principal officer thereof.

SOURCES: Laws, 1956, ch 412, § 10, eff May 1, 1956.

APPENDIX F

Mississippi State Tax Commission Regulations No. 10

Article 250. *Formula to be Used by Pipe Line Companies in Reporting Net Income to Mississippi*—In determining the net income allocable to and to be subjected to the Mississippi income tax, an apportionment ratio will be employed by pipe line companies, which will consist of the average of the sum of the ratios of the following factors:

1. The ratio of gross revenues arising within the State of Mississippi from the unitary operation as related to the total corresponding gross revenues of the system;

2. The ratio of the average (at the beginning and end of the taxable period) accumulated investment in real and in tangible personal property (other than inventories) used or employed in connection with the unitary operations within Mississippi as related to the total for the system;

3. The ratio of salaries and wages paid or incurred in the unitary operations within Mississippi as related to the corresponding total for the system;

The above factors will be used in arriving at the apportionment ratio only in those cases where the books of account of the taxpayer will not admit of a correct or accurate determination of the net income derived from the unitary operation within this State.

The elements in this formula are to be defined as follows:

Factor one shall be defined to mean the dollar revenues arising within the State of Mississippi from deliveries made within the State of Mississippi.

Factor two shall be defined to mean and include land, buildings, machinery, equipment and other tangible personal property actually used in transportation of property for delivery or sale. Such factor shall also include any real or tangible personal property appertaining to the company's unitary operations. Appreciation shall be eliminated from book values for purposes of apportionment.

and the value at which tangible property shall be included in the apportionable factor is average cost at the beginning and end of the taxable year. The figures used shall include cost less depreciation or depletion sustained. Assets which produce non-apportionable or nontaxable income shall not be included in the figures employed in this element of the formula. Inventories, cash on hand or in banks, stocks, notes, bonds, accounts receivable, notes receivable, privileges, franchises and goodwill are specifically excluded from the capital assets element of the formula.

[a] Factor three shall be defined to mean the ratio of salaries and wages paid or incurred in the unitary operations within Mississippi as related to the corresponding total for the system.

The apportionable profit will be determined from the total net income for the year as reported on the return blank prescribed. This total net income will be Federal net income plus deductions not allowable, and less income not taxable under the Mississippi Income Tax Law. There will be deducted therefrom intangible income, provided, however, that intangible income will first be reduced by the amount of interest paid; all rentals and royalties; all profits from sales of capital assets; all salaries, wages and compensations received for other personal services and all other income earned directly from sources without the State.

There will also be deducted therefrom, and allocated directly to Mississippi, similar items realized from sources within the State of Mississippi. Intangible income will be considered Mississippi income in those cases where the evidence of ownership has acquired a business situs within the State of Mississippi.

To the foregoing, there will be added taxes paid (other than Federal and State income taxes and Local Benefit Taxes) interest, rents and royalties, and all other expenses not related to the unitary or apportionable income.

Such expenses, applicable to the non-unitary Mississippi operations, will be deductible from the net profits allocated to Mississippi.

This formula must be adhered to, unless the Commissioner shall grant special permission in writing to employ an alternative formula.

As a result of changing economic conditions, the Commissioner, within his authority granted by these Regulations, may change or add additional elements or factors to this formula. However, such change shall be after notice to each of the pipe line companies required to report under this formula, and such addition or change as may be devised by the Commissioner shall be effective only for returns filed subsequent to the receipt of notice by the Commissioner.

Mississippi State Tax Commission Regulations No. 11

Article 247. *Taxable Net Income of Foreign Corporations and Non-Residents*—Except as provided elsewhere in these Regulations, and for the purpose of Section 11 of the Act, foreign corporations as defined in Section 2(e) of the Act, and non-residents as defined in Section 2(f) of the Act will be classified and shall determine their Mississippi net income, as follows:

(1) Taxpayers whose entire gross income is from sources within the State. These taxpayers shall determine their Mississippi net income in the same manner as domestic corporations, having no income from sources without the State, and residents, excepting for the limitation on contributions of a non-resident provided by Section 8 (9) of the Act.

(2) Taxpayers who derive gross income from within and without the State but who maintain, or could maintain, a system of accounts which will clearly and accurately reflect the gross income derived from within the State of Mississippi. Taxpayers of this class, including merchants and traders, shall determine their Mississippi net income by first deducting from their Mississippi gross income those costs and expenses which can be allocated directly against

said income. They shall then deduct a pro rata part of non-allocable expenses by using the ratio between Mississippi gross income and total gross income.

(3) Taxpayers whose gross income is derived from partly within and partly without the State, but who, because of the unitary nature of the business, cannot maintain systems of account which will clearly and accurately reflect the gross income derived from within the State of Mississippi. These taxpayers shall determine their Mississippi net income in the manner hereinafter provided:

Computation of Unitary Net Income—Total net income, as computed for federal income tax purposes, shall be adjusted for deductions not allowable and income not taxable, regardless of situs, under the Mississippi Income Tax Law. From total net income thus adjusted there shall be deducted all income specifically allocable to Mississippi and other jurisdictions and there shall be added to total net income thus adjusted deductions specifically allocable to Mississippi and other jurisdictions. Interest expense reflected in the remaining unitary net income shall be reduced by interest income and dividend income not reflected in the remaining unitary net income, and not otherwise included in Mississippi taxable income. When capital assets in the form of tangible personal property, which have been used or employed in the unitary business without any fixed situs, are sold or disposed of at a gain or loss, and said gain or loss is not otherwise reflected in Mississippi net income, said gain or loss must be reflected in the unitary net income in the ratio that depreciation on the assets charged against unitary net income while the taxpayer has been subject to the Mississippi Income Tax Law, bears to total depreciation charged on said assets.

When total unitary net income has been computed in the above described manner, a part thereof shall be apportioned to Mississippi by use of the proper formula, as hereinafter set out.

To the unitary net income thus apportioned to Mississippi there shall be added income specifically allocable to this state and there shall be deducted therefrom expenses and other charges specifically allocable to this state.

Apportionment of Unitary Net Income—

Manufacturers—Manufacturers shall apportion a part of their unitary net income to this State by the use of a ratio which shall be the arithmetical average of the following three ratios: (1) Manufacturing assets owned or used in Mississippi to total manufacturing assets. (2) Mississippi manufacturing labor to total manufacturing labor. (3) Mississippi sales to total sales.

Property—The first factor of the formula includes land, buildings, machinery, equipment, and other tangible personal property actually used, whether owned or rented, in manufacturing or producing the articles or commodities manufactured. Construction in progress may not be included. Appreciation must be eliminated from book values for purposes of apportionment, and the value at which tangible property should be included in the factor is the average of the book value at the beginning and end of the taxable period. If rented, the value to be employed shall be eight (8) times the annual rental. Assets which produce non-apportionable or non-taxable income should not be included in the figures employed in this factor of the formula. Inventories, cash on hand or in banks, stocks, notes, bonds, accounts receivable, notes receivable, privileges, franchises and good will are specifically excluded.

Payroll—The numerator of the payroll ratio shall consist of wages or other compensation paid or incurred for direct and indirect manufacturing labor performed within Mississippi in connection with the unitary trade or business. The denominator shall consist of total wages or other compensation paid or incurred for direct or indirect manufac-

turing labor performed in connection with the unitary trade or business.

Sales—In computing the sales ratio, gross receipts shall be assigned to that office, agency or place of business at which a binding sale, or agreement to sell, first occurs; provided that, when goods are shipped or delivered from a place of business, warehouse or inventory within one state to a customer within the same state, the gross receipts from said sale shall be assigned to that state regardless of the situs of the agreement to sell.

Pipe Lines (other than carriers)—Pipe line companies which move or transport their own minerals and mineral products to points of delivery shall apportion a part of their unitary net income to this State by the use of a ratio which shall be the arithmetical average of the following three ratios: (1) Pipe line property owned or used in Mississippi to total pipe line property. (2) Mississippi operating labor to total operating labor. (3) Deliveries in Mississippi to total deliveries.

Property—The first factor of the formula includes land, buildings, machinery, equipment, and other tangible personal property actually used, whether owned or rented, in connection with the transportation of minerals and mineral products. Property employed in administrative functions, buying, selling, research or any other functions not directly connected with the transportation of gas shall be excluded, it being intended to include in this factor only pipe line property, its appurtenances, and property and equipment directly connected with the operation and maintenance thereof. Construction in progress may not be included. Appreciation must be eliminated from book values for purposes of apportionment. The value at which property owned should be included in the factor is the cost, less depreciation sustained, averaged as of the beginning and end of the taxable period. In the case of rented property, the value to be employed shall be eight (8) times the annual

rental. Assets which produce non-apportionable or non-taxable income should not be included. Inventories, cash on hand or in banks, stocks, notes, bonds, accounts receivable, notes receivable, privileges, franchises and good will are specifically excluded.

Labor—The Labor factor includes wages or other compensation paid or incurred for direct and indirect operating labor in connection with the transportation of minerals and mineral products. Wages or other compensation paid in connection with administrative functions, buying, selling, research or any other functions not directly connected with said transportation shall be excluded, it being intended to include in this factor only labor performed in the operation and maintenance of the pipe line, its appurtenances, and other property and equipment directly connected therewith. Labor on construction in progress may not be included.

Deliveries—This ratio shall be determined by dividing revenue derived from deliveries in Mississippi by revenue derived from total deliveries.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

No. 223

TENNESSEE GAS TRANSMISSION COMPANY — Appellant

vs.

MISSISSIPPI STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

JOHN E. STONE
P. O. Box 960
Jackson, Mississippi
Attorney for Appellee

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No. 223

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, 1960

TENNESSEE GAS TRANSMISSION COMPANY — Appellant

vs.

MISSISSIPPI STATE TAX COMMISSION — Appellee

APPEAL FROM THE SUPREME COURT OF THE STATE OF MISSISSIPPI

MOTION TO DISMISS

Appellee, pursuant to Rule 16 of the Revised Rules of the Supreme Court of the United States, moves that the appeal in this case be dismissed and that the final judgment of the Supreme Court of Mississippi be affirmed, on the grounds that this cause does not present a substantial federal question and the questions on which the decision of the cause depends are so unsubstantial as not to need further argument.

I.

STATEMENT OF FACTS AND ISSUES OF APPEAL

This cause is an appeal from an additional assessment of franchise tax under the provisions of *Section* 9319, *Mississippi Code of* 1942, Recompiled, as amended

by *Chapter* 412, *Laws of Mississippi Legislature of* 1956, for the years 1956 and 1957.

Appellant, a Deleware corporation and its predecessor a Tennessee corporation have been qualified to do business in the State of Mississippi since 1943. It owned and operated through the State of Mississippi natural gas transmission lines through which it transmitted natural gas gathered in the States of Texas and Louisiana to northern states.

During the years involved in this suit appellant owned in the State of Mississippi 925 miles of pipe line; four compressor stations, having a total of approximately 85,610 horse power; forty-five automobiles, dwelling houses on its compression station property, which houses were used by its maintenance and operating employees; and a partial interest in thirteen oil wells, none of which it operated.

Appellant made no direct sales of gas in the State of Mississippi for the tax years here involved, but did make some wholesale deliveries.

Power used to operate appellant's gas transmission compressor stations was generated from gas taken from appellant's gas transmission lines at its pumping stations in Mississippi. Also, appellant has invoked the right of eminent domain as granted by the statutes of Mississippi on several occasions.

Prior to the 1956 amendment the Corporate Franchise Tax Statutes provided a formula for the computation of the tax composed of the following factors:

Section 9319, *Mississippi Code of* 1942, Recompiled:

". . . the ratio which the real estate and tangible personal property owned or used in this state and

the gross receipts from business carried on in this State bears to the total real estate, tangible personal property, and gross receipts wherever located and from wherever received. . . ."

The 1956 Legislature of Mississippi added the following paragraph unto the statute:

Chapter 412, *Laws* 1956, Legislature of Mississippi:

"For the purpose of this section, an organization which uses a formula method of apportionment in making income tax returns to this state shall determine its gross receipts from business carried on in Mississippi by applying to total unitary receipts the ratio achieved, or which would be achieved, by such formula and adding to the result of such application any nonunitary Mississippi receipts."

The question is whether *Chapter* 412, *Laws Mississippi Legislature* 1956, as applied to appellant violates the commerce, due process and equal protection clauses of the Constitution of the United States.

II.

ARGUMENT

POINT 1.

THE INCIDENCE OF THE MISSISSIPPI CORPORATE FRANCHISE TAX IS UPON THE PROTECTION OF CORPORATE EXISTENCE AFFORDED BY THE LAWS OF THE STATE

The Mississippi Corporate Franchise Tax is an exaction by the state for the protection afforded by its laws.

Section 9314, *Mississippi Code of* 1942, *Recompiled*:

". . . It being the purpose of this section to require the payment of a tax by all organizations not organiz-

ed under the laws of this state, measured by the amount of capital or its equivalent, for which such organization receives the benefit and protection of the government and laws of the State."

Southern Package Corporation v. State Tax Commission, 195 Miss. 864, 872, 15 So. (2d) 436;

Stone v. Interstate Natural Gas Co., (CCA 5th), 103 Fed. (2d) 544, 548, affirmed in 308 U. S. 522.

Such exactions do not violate the commerce clause of the United States Constitution.

Memphis Natural Gas Company v. Stone, 335 U. S. 80.

POINT 2.

ONE ATTACKING AN APPORTIONMENT FORMULA MUST SHOW BY CLEAR PROOF THAT EXTRA-TERRITORIAL VALUES ARE BEING TAXED

The distinct burden is on one who attacks a formula of apportionment of showing by clear and cogent evidence that it results in extra-territorial values being taxed.

Bass, Ratcliff & Gretton, Ltd. v. State Tax Commission, 266 U. S. 271, 282;

Norfolk & Western Railway Co. v. State of North Carolina, ex rel A. J. Maxwell, 297 U. S. 682, 688;

Butler Bros. v. McColgan, 315 U. S. 501, 507;

Railway Express Agency v. Virginia, 358 U. S. 434, 436, 444.

Appellant did not attempt to show that the formula in its actual application taxed extra-territorial values but

contented itself with showing that one factor in the formula had been increased in value eight times. As a matter of fact the formula in this case, as applied to appellant, does not tax extra-territorial values (see Appendix).

There is nothing to show from the proof made by the appellant that multiple taxation is present.

Northwestern States Portland Cement Co. v. Minnesota, 358 U. S. 450, 462.

It is respectfully submitted that the validity of an apportionment formula is tested by its overall result rather than by the value of one of its component factors.

Alpha Portland Cement Co. v. Commonwealth, 139 NE 158, 164:

> ". . . It seems to us that the question in this connection is not whether a subsidiary percentage standing alone may impinge upon property outside the commonwealth, but whether the use of all of the percentages makes the final result a tax which violates constitutional guarantees. The several percentages are not taxes levied upon the terms employed. They are used in combination to ascertain a sum which in amount as applied to all corporations may be reasonable. . ."

Of course, the component parts of a formula would have to bear some valid relationship to the subject matter of the tax and certainly it goes without saying that gross receipts bear such a relationship to corporate franchise taxes.

This Court has never held the states to mathematical exactitude in such matters.

Illinois Central Railroad Co. v. Minnesota, 309 U. S. 157, 161;

Mullaney v. Anderson, 342 U. S. 415, 418.

Appellant concedes that it is subject to the Mississippi franchise tax and that the amount of capital employed in the state may be determined by use of the factors of real and tangible personal property owned or used in Mississippi; gross receipts from business carried on in Mississippi, total real and tangible personal property wherever located, and gross receipts from wherever received.

Appellant disputes only the validity of the method of determination of the factor of "gross receipts from business carried on in Mississippi," which is required by the 1956 legislative enactment for those organization using a formula method of apportionment in making income tax returns. (Jurisdictional Statement, page 12).

The ultimate question for decision is not necessarily whether the State of Mississippi is taxing more than its share of appellant's capital but whether appellant has proved that it has done so. The presumption is to the contrary. This burden is on the appellant, who has possession of all of its books and records, and not on the appellee who has none of these.

There is nothing novel about this question. The law has been stated by this Court many times, the leading cases being *Hans Rees' Sons, Inc. v. North Carolina, ex rel Maxwell*, 283 U. S. 123 and *Butler Bros. v. McColgan*, 315 U. S. 501, 507. Appellant having failed to make its proof should fail in the maintenance of its case.

WHEREFORE, premises considered appellee prays that the appeal in this case be dismissed.

Respectfully submitted,

JOHN E. STONE
Attorney for Appellee

APPENDIX "A"

TENNESSEE GAS TRANSMISSION COMPANY
HOUSTON, TEXAS
EQUITY CAPITAL INVESTED IN MISSISSIPPI REAL AND TANGIBLE PERSONAL PROPERTY AT DECEMBER 31, 1955

Equity Capital	
Preferred Stock	$ 97,556,800.00
Common Stock	73,225,425.00
Premium on Capital Stock and Capital Surplus	54,152,268.00
Retained Earnings	38,828,869.00
Total Equity Capital	263,763,362.00
Borrowed Capital	
Long Term Debt	518,388,000.00
Notes Payable to Banks	33,000,000.00
Total Borrowed Capital	551,388,000.00
Total Capital—Equity and Borrowed	815,151,362.00
Ratio Equity Capital to Total Capital	32.36%
Total investment in real and tangible personal property in Mississippi at December 31, 1955	81,531,070.00
Equity capital invested in Mississippi real and tangible personal property at December 31, 1955—32.36% of $81,531,070	$ 26,383,454.00
Capital under the assessment	22,159,288.00
Untaxed equity capital	$ 4,224,166.00

(Figures taken from Exhibit "1", Record 39)

APPENDIX "B"

TENNESSEE GAS TRANSMISSION COMPANY
HOUSTON, TEXAS
EQUITY CAPITAL INVESTED IN MISSISSIPPI REAL AND TANGIBLE PERSONAL PROPERTY AT DECEMBER 31, 1956

Equity Capital	
Preferred Stock	$ 155,950,000.00
Common Stock	73,298,405.00
Premium on Capital Stock and Capital Surplus	54,548,324.00
Retained Earnings	43,660,237.00
Total Equity Capital	$ 483,406,966.00
Borrowed Capital	
Long Term Debt	$ 572,728,000.00
Notes Payable Bank	39,947,000.00
Total Capital Borrowed	$ 612,675,000.00
Total Capital Equity And Borrowed	$1,096,081,966.00
Ratio Equity Capital to Total Capital	44.1032%
Total Investment Real and Personal Property in Mississippi at 12/31/56	$ 83,718,195.77
Equity Capital Invested in Mississippi real and tangible personal property at 12/31/56 44.1032% x $83,718,195.77	$ 36,922,403.31
Capital under the assessment	25,642,500.00
Untaxed equity capital	$ 11,279,903.31

(Figures taken from Exhibit "1", Record 39)

III

CERTIFICATE

I, John E. Stone, attorney for the appellee in this cause, certify that I have this day mailed postage prepaid to:

Honorable F. Cleveland Hendrick, Jr.
1001 Connecticut Avenue, N. W.
Washington 6, D. C.
Honorable John G. Brendel
Post Office Box 2511
Houston, Texas
Honorable C. S. Tindall
Wynn, Hafter, Lake & Tindall
Weinbarg Building
Greenville, Mississippi
Honorable Fred S. Gilbert, Jr.
1001 Connecticut Avenue, N. W.
Washington 6, D. C.

true copies of the above and foregoing Motion

This 29th day of July, 1960.

John E. Stone

John E. Stone
P. O. Box 960
Jackson, Mississippi
Attorney for Appellee

IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 223

TENNESSEE GAS TRANSMISSION COMPANY, *Appellant*,

v.

MISSISSIPPI STATE TAX COMMISSION, *Appellee*.

Appeal from the Supreme Court of the State of Mississippi

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

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IN THE

Supreme Court of the United States

OCTOBER TERM, 1960

No. 223

TENNESSEE GAS TRANSMISSION COMPANY, *Appellant*,

v.

MISSISSIPPI STATE TAX COMMISSION, *Appellee*.

Appeal from the Supreme Court of the State of Mississippi

BRIEF OF APPELLANT IN OPPOSITION TO APPELLEE'S MOTION TO DISMISS

Appellant contends, for reasons presented in its "Statement As To Jurisdiction" and for those assigned in the following brief, that this cause presents substantial Federal questions that are so substantial as to require the submission of briefs and oral argument on the merits before this Court.

Appellee's Motion To Dismiss should therefore be denied.

I.

STATEMENT OF THE CASE

Appellant has no objection to the statement of the case set forth in Appellee's Motion To Dismiss except insofar as allegations contained in the appendix thereto are treated by Appellee as established facts. This material was attached to a pleading which required no responsive pleading (R-39) and therefore was never admitted by Appellant. These allegations were never proved either by way of stipulation (R-41) or by evidence introduced at the time of trial (R-49)

II.

ARGUMENT

The principal argument advanced by Appellee in its Motion to Dismiss is set forth as follows (p. 6):

> Appellant concedes that it is subject to the Mississippi franchise tax and that the amount of capital employed in the state may be determined by use of the factors of real and tangible personal property owned or used in Mississippi; gross receipts from business carried on in Mississippi, total real and tangible personal property wherever located, and gross receipts from wherever received.
>
> Appellant disputes only the validity of the method of determination of the factor of "gross receipts from business carried on in Mississippi," which is required by the 1956 legislative enactment for those organizations using a formula method of apportionment in making income tax returns. (Jurisdictional Statement, page 12).
>
> The ultimate question for decision is not necessarily whether the State of Mississippi is taxing more than its share of Appellant's capital but

whether appellant has proved that it has done so. The presumption is to the contrary. This burden is on the appellant, who has possession of all of its books and records, and not on the appellee who has none of these.

There is nothing novel about this question. The law has been stated by this Court many times, the leading cases being *Hans Rees' Sons, Inc.* v. *North Carolina, ex rel Maxwell*, 283 U.S. 123 and *Butler Bros.* v. *McColgan* (sic), 315 U.S. 501, 507. Appellant having failed to make its proof should fail in the maintenance of its case.

Appellee obviously misses the thrust of Appellant's attack on the Mississippi franchise tax apportionment formula, misconstrues the nature of Appellant's burden in attacking such formula, and fails to appreciate the basic nature of a fair or reasonable apportionment formula.

1.

The Revised Mississippi Franchise Tax Apportionment Formula Results in the Taxation of Extraterritorial Capital

In *Memphis Natural Gas Company* v. *Stone*, 335 U.S. 80 (1948), this Court passed upon the validity of the Mississippi franchise tax as imposed on foreign corporations prior to the amendment by the Mississippi State Legislature in 1956 of Section 9319, Mississippi Code of 1942, Recompiled. It is precisely this amendment, and the constitutionality of the statute as amended, that forms the basis of this appeal. Although the tax itself was challenged, the apportionment formula in its earlier form was not under attack in the *Memphis* case.

Prior to the 1956 amendment, the Mississippi franchise tax apportionment formula used actual Missis-

sippi figures in arriving at the amount of Mississippi property and gross receipts from business carried on in that state. The 1956 amendment complained of required the substitution, for actual gross receipts from business carried on in Mississippi, of a figure arrived at through the use of another apportionment formula designed to compute net income for purposes of the Mississippi net income tax. The effect of this substitution in Appellant's case for the year 1956 was to increase the Mississippi gross receipts factor in the formula from $1,397,333 to $11,204,833, thus adding to the numerator of the formula the amount of $9,807,500 of extraterritorial gross receipts. The amount of extraterritorial gross receipts added was more than eight times the amount of actual Mississippi gross receipts and comprised 88 per cent of the apportioned gross receipts required to be used in the formula under the 1956 amendment. This resulted in the Mississippi franchise tax being applied to $2,343,538 of non-Mississippi capital.

2.

Appellant May Challenge the Mississippi State Franchise Tax Apportionment Formula as Being Invalid on Its Face

This Court has clearly implied, if not expressly held, that an apportionment formula may be invalid on its face, *Norfolk and Western R. Co.* v. *No. Carolina*, 297 U.S. 682 (1936). The Court also recognized that even though valid on its face, an apportionment formula can be unworkable or unfair when applied to a particular taxpayer in particular conditions.

The test set forth by this Court in *Butler Bros.* v. *McColgan*, 315 U.S. 501 (1942) citing the *Bass* and

Ford Motor Company cases[1] is whether the statutory formula of allocation is "fairly calculated" to assign to the taxing state that portion of the net income or capital "reasonably attributable" to the business done there. A statutory formula which does not meet this test is invalid on its face. Obviously then it is only when the apportionment formula is not invalid on its face that proof by clear and cogent evidence of the taxation of extraterritorial values is required for the demonstration of its invalidity.

Each of the cases cited by Appellee in support of its argument that Appellant has not met the burden of showing the unconstitutional taxation of extraterritorial values involves the question of whether an apportionment formula not invalid on its face is unconstitutional in its application to the specific facts in that case. It is in situations involving the application of an apparently valid formula that this Court has required "clear and cogent" evidence of the taxation of extraterritorial values and has not held the states to mathematical exactitude. Appellant submits that the burden of showing that an apportionment is invalid on its face is quite different from the burden required where the attack is leveled on an apparently valid formula.

This case is novel in that it clearly raises the question of whether an apportionment formula may be considered unconstitutional as invalid on its face. Certainly this is a question which should be fully considered and definitely determined by this Court.

[1] *Bass, Ratcliff and Gretton Ltd. v. State Tax Commission*, 266 U.S. 271 (1924); *Ford Motor Co. v. Beauchamp*, 308 U.S. 331 (1939).

3.

The Revised Mississippi Franchise Tax Apportionment Formula Is Invalid on Its Face

In holding that the Mississippi franchise tax levied under the old form of apportionment formula was not discriminatory, this Court in the *Memphis* case, *supra*, observed (p. 88):

> . . . A glance at the activities, named above, listed by the Supreme Court of Mississippi, shows that there is no possibility of multiple taxation through the same exaction by other states. The amount of tax is reasonable. It is properly apportioned to the investment in Mississippi.

It follows that if the tax is not "properly apportioned to the investment in Mississippi" then the tax is applied to the investment in other states and there is a "possibility of multiple taxation through the same exaction by other states." Appellant submits that a franchise tax can be duplicated in other states unless each of the taxing states is required to use factors having a direct relation to the taxing state in framing its apportionment formula. If the factors in the formula contain extraterritorial elements, its use can and will result in the application of the tax to the investment in other states and, therefore, render the formula invalid on its face.

Appellant contends that the Mississippi franchise tax apportionment formula is invalid on its face because it departs from the fundamental principle of a fair and reasonable apportionment formula in that the "Mississippi Gross Receipts" factor in the numerator of the formula is not limited to items having actual or direct connection with Mississippi but, rather, is derived largely from extraterritorial values. In the plethora of cases considered by this Court, wherein ap-

portionment formulas used by states in imposing franchise taxes on foreign corporations have been upheld, one common pattern has emerged. In all of these cases the business elements such as property or gross receipts, which comprised the various factors of the apportionment formula bore a direct relation to and had a clear nexus to the taxing state. In this case the elements required by the statute to be included in the "Mississippi Gross Receipts" factor of the formula bear no such logical or discernable relationship to that State but, rather, are rightfully attributable to business in other states. The presence of these extraterritorial values in the numerator of the formula affects its basic fairness and applies the tax to extraterritorial capital.

Not only is the franchise tax formula invalid on its face, as shown above, it is clearly invalid in its application as will be demonstrated below. As previously indicated, the 1956 amendment changed the Mississippi franchise tax formula by substituting for actual Mississippi gross receipts an apportioned gross receipts figure which is more than eight times as great as actual gross receipts. This is accomplished by taking the Mississippi net income tax apportionment formula and applying the percentage thus obtained to unitary gross receipts of Appellant. The $9,807,500 of gross receipts thus required to be added to the numerator of the formula are extraterritorial gross receipts. The $2,343,538 of capital required to be added to the tax base is extraterritorial capital.

Even assuming that the Mississippi income tax formula is valid, this still does not mean that its application to total unitary receipts produces a proper measure of Mississippi gross receipts as a factor to be used in the franchise tax apportionment formula.

The Mississippi income tax formula, like the franchise tax formulas previously upheld by this Court, contains only factors having actual connection with Mississippi. As indicated above, its use may arrive at a fair result in apportioning net income to Mississippi for income tax purposes, but it does not follow that it may be used to apportion extraterritorial gross receipts to Mississippi as a part of the franchise tax formula since this gives extraterritorial values great weight in the latter formula and results in the application of the tax to extraterritorial capital.

III.

CONCLUSION

For the reasons discussed in Appellant's "Statement as to Jurisdiction" and for those stated herein, it is urged that Appellee's Motion to Dismiss should be denied and that the Court should give plenary consideration to the case and permit the filing of briefs and oral argument on the merits.

Respectfully submitted,

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